

Exhibit 1

To the Zakarin Reply Declaration
in further support of
Defendants' *Daubert* motion of Bob Kohn

Kohn Deposition Volume I

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

-----x
TWELVE SIXTY LLC, ARON
MARDEROSIAN and ROBERT
MARDEROSIAN,

Plaintiffs,

-against-

Civil Action No.:
1:17-CV-01479-PAC

EXTREME MUSIC LIBRARY LIMITED,
a division of Sony/ATV Music
Publishing; EXTREME MUSIC
LIMITED; VIACOM INTERNATIONAL
INC., NEW CREATIVE MIX INC.,
HYPE PRODUCTION MUSIC,
Defendants.

-----x

November 1, 2018
1:00 p.m.

Deposition of ROBERT H. KOHN, taken by
Defendants, pursuant to Notice, held at the law
offices of Pryor Cashman, LLP, 7 Times Square, New
York, New York, before Judith Castore, a Certified
Livenote Reporter and Notary Public of the State of
New York.

A P P E A R A N C E S
ON BEHALF OF PLAINTIFFS

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KOHN

2

devoted something slightly north of 100

3

hours to your work on this case?

4

A Yes.

5

Q Okay. That's including

6

attending depositions and whatever

7

else?

8

A Yes.

9

Q Okay.

10

In connection with the

11

preparation of your report, did you

12

communicate at all verbally or in

13

writing with any production music

14

library companies?

15

A No.

16

Q Have you communicated at all

17

verbally or in writing with any

18

executives of any production music

19

library companies?

20

A No.

21

Q Have you communicated at all

22

verbally or in writing with any music

23

publishing companies? And when I say

24

music publishing companies, I'm

25

referring to popular music publishing

1 KOHN

2 companies, whether it's Warner Chapel,
3 Sony ATV, ABMG.

4 A Not in --

5 Q Just to distinguish them from
6 a production music library.

7 A If you're asking in
8 connection with this case?

9 Q In connection with this case.

10 A No.

11 Q And I'm actually asking in
12 connection with the generation of your
13 report.

14 A No.

15 Q Have you ever been employed
16 by a production music library company?

17 A I wouldn't call it employed.
18 My uncle ran one of the largest
19 production music libraries in the world
20 of its time, which was Southern Music
21 Library which was owned by Peer Music.

22 COURT REPORTER: I'm sorry?

23 Owned by?

24 A Peer Music, P-e-e-r. Peer
25 Music.

1 KOHN

2 Q Did you work for him?

3 A Well, I provided him with
4 advice. I never charged him.

5 Q When did you provide him with
6 advice?

7 A This would have been back in
8 the 1980s.

9 Q Do you remember the subject
10 matter in which you provided him
11 advice?

12 A Yeah. My best memory is that
13 he invited me to his office, and
14 because it was during the time in which
15 I was writing the first edition of Kohn
16 on Music Licensing. I think it was the
17 1980s. It could have been the early
18 '90s, but I'm pretty sure it was before
19 the first edition. As a matter of fact
20 I do -- it had to have been in the
21 '80s. I was living in Los Angeles. So
22 probably prior to '87.

23 I had visited his office,
24 which was a little one-man office in
25 Taluka Lake, California, which is near

1

KOHN

2

Burbank, I think. And I spent all

3

morning with him. He took phone calls.

4

He was talking to people giving

5

licenses. I recall actually something

6

pretty funny, at least he thought it

7

was funny to me because he had got a

8

call from -- that day from a company

9

that wanted to use a needle drop in

10

a --

11

COURT REPORTER: I'm sorry,

12

sir. Can you just look this way?

13

A A needle drop -- yeah. A

14

needle drop in a porno film and they

15

came up with a song called Big Hammer.

16

And he thought that was funny. And he

17

takes the -- he had record albums at

18

the time and then he would take a DAT

19

tape, D-A-T, digital audiotape and do

20

recordings. Stick it in an envelope

21

and put a contract with it or license

22

with it and send it off to the guy who

23

took the phone call.

24

And what I -- what I did for

25

him because I looked at the license

1

KOHN

2

that he did, and by that time I had

3

been out of Rudin's office and I had

4

some experience in synchronization

5

licenses and such, and I was kind of

6

surprised how simple that form was.

7

And it could be better. And I could

8

make it better. And I actually put

9

together a synchronization license for

10

him, which he thought was too long, and

11

I got it down to one page and gave that

12

to him and he went ahead and started

13

using that. And, you know, I'd always

14

see him at family events and things

15

like that.

16

And over the years we talked

17

about what he was doing, et cetera, and

18

he was using my license for quite a

19

while. So I had that. It was a

20

one-man shop at that time, but he

21

certainly had a lot of experience in

22

dealing with a major production music

23

library. And I got a sort of -- got an

24

idea of what that was through that

25

experience.

1 KOHN

2 Q Okay.

3 So you were not employed by
4 Music Production -- a production music
5 library company but you did this little
6 consulting project on a sync license,
7 as it were, for your uncle back in the
8 '80s?

9 A Well, I would say, yeah. I
10 mean, whatever questions he had for me
11 and other things that I might have over
12 the years that I don't really remember
13 frankly.

14 Q Have you ever engaged in
15 licensing on behalf of a production
16 music library company?

17 A Not of a production music --
18 you said engaged in licensing?

19 Q Yeah.

20 A Actually issuing a license?
21 No.

22 Q Have you ever been in
23 engaged --

24 A Not for a production music
25 library.

1 KOHN

2 picture, I was directly involved with
3 the amount of money that was involved,
4 you know, in that. It was a -- you
5 come to a point where some fee is
6 established and everyone answers for --
7 no, most favored nations. So it
8 becomes easy at a point.

9 There's only so many of these
10 things you have to do in order to
11 become knowledgeable on how these
12 things are done. I don't need to do
13 10,000 synchronization licenses in
14 order to learn how these things are
15 negotiated.

16 Q Have you ever worked for a
17 PRO in dealing with cue sheets and
18 broadcasters?

19 A I never worked for a PRO, no.

20 Q Now in your report you state
21 that acquiring a work on a
22 work-for-hire basis does not mean that
23 there are no other obligations owed to
24 the writer.

25 Now, you know that a work for

1 Kohn

2 now.

3 But I'm just trying to help
4 the process so that Mr. Zakarin,
5 on behalf of his clients, can get
6 your opinions and question the
7 opinions that you set forth in
8 your report.

9 THE WITNESS: Thanks, Mick.

10 MR. MARDEROSIAN: All right.

11 Q Okay.

12 Where were we? Did we have
13 an answer? Let's try to get back to
14 where we were. Give me a second.

15 Now, you gleaned this -- the
16 knowledge of the custom and practice
17 from being on panels with people like
18 Massarsky and from the production music
19 library contracts, the work for hire
20 contracts you've looked at?

21 A And discussions that I've had
22 with my Uncle Roy and the advice that I
23 might have given him over a period of
24 years, that he might have asked me
25 questions that I have given him. He

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KOHN

was the closest person in my life whose full-time business for 40 years was running a production music library. He was my uncle, and I would see him very -- almost every weekend, you know, in California.

Q Is he still alive?

A No. He passed away last year -- or two years ago.

Q I'm sorry.

A He was 91, lived a good life.

Q But as you testified already, in connection with your forming of your report, you did not consult with, talk to any production music libraries or executives at those companies?

A No.

Q Okay.

Now, you've talked about having looked at some, I think, 15 licenses, I think you said, of the -- of the plaintiff's work -- of their self-published works, I guess it is; is that right?

1 KOHN

2 that your client runs as the name of
3 the composer. Now, how did that
4 happen, I say rhetorically.

5 So that -- when they cause
6 mistakes like that, they have every
7 obligation to fix the mistake. Rob and
8 Aron didn't make those mistakes.

9 Q Tell me something. You just
10 said that our client provided very bad
11 metadata.

12 Have you seen the metadata?

13 Have you seen the metadata?

14 MR. MARDEROSIAN: Object.

15 It's vague and overbroad.

16 What metadata are you
17 referring to?

18 MR. ZAKARIN: He's just --

19 THE WITNESS: I don't need
20 the see metadata.

21 MR. MARDEROSIAN: Hold on.

22 Excuse me.

23 We made a request for
24 production of the hard drives, and
25 you said that they don't exist any

1 KOHN

2 longer.

3 So are you now changing that?

4 MR. ZAKARIN: Yeah. The
5 witness has --

6 MR. MARDEROSIAN: Do they
7 exist or not?

8 MR. ZAKARIN: The witness has
9 made a statement, and I've asked
10 him the appropriate question.

11 Q Have you seen the metadata
12 that you said was bad?

13 MR. MARDEROSIAN:
14 Mr. Zakarin, I asked for the
15 metadata. I wanted to see the
16 metadata that Dan White and Russel
17 Emanuel were sending with the
18 audio tracks. And I have been
19 repeatedly told through the
20 discovery of this case it no
21 longer exists.

22 Are you now changing -- does
23 it exist or not?

24 MR. BAGLEY: Where was that
25 discovery request?

1 KOHN

2 MR. ZAKARIN: You are --
3 wait. Shh. Shh. That's right.

4 MR. MARDEROSIAN: In the
5 depositions.

6 MR. ZAKARIN: There is no
7 such --

8 MR. MARDEROSIAN: In the
9 depositions.

10 MR. ZAKARIN: I don't care.
11 It doesn't matter. That has
12 nothing to do with my question.

13 You're vamping now, Mick, and
14 it's not very effective.

15 MR. MARDEROSIAN: I'm not
16 vamping at all.

17 MR. ZAKARIN: You are.
18 There's a question on the record.
19 You answer it.

20 Q Have you seen any of the
21 metadata that you have now stated was
22 bad?

23 A The word "Mix Tape" is part
24 of the metadata. So the answer is yes.

25 Q You don't know it is, do you?

1 Kohn

2 A Yes, I do. How else would
3 that --

4 MR. MARDEROSIAN: Hold on.

5 You're arguing now.

6 Let's take a break. We're
7 taking a break.

8 You need to control yourself
9 and stop arguing with the witness.

10 MR. ZAKARIN: I'm fine.

11 MR. MARDEROSIAN: Let's take
12 a break.

13 MR. ZAKARIN: I'm fine.

14 MR. MARDEROSIAN: You're
15 arguing with the witness.

16 MR. ZAKARIN: You can take a
17 break, but I am fine.

18 MR. MARDEROSIAN: We're going
19 to take a break because you're --
20 you need to calm down.

21 (Whereupon, a brief recess
22 was taken.)

23 Q It's a simple question.

24 MR. ZAKARIN: This is working
25 now?

1 Kohn

2 COURT REPORTER: It should
3 be, yes.

4 MR. ZAKARIN: Okay.

5 MR. MARDEROSIAN: When you
6 say "simple question," we really
7 don't need remarks like that on
8 the record, Don. That's
9 argumentative.

10 MR. ZAKARIN: Thank you,
11 Mick.

12 Q Mr. Kohn, you haven't seen
13 any of the metadata; isn't that
14 correct?

15 A What I testified to earlier
16 is that when I saw the word "Mix Tape"
17 as the name of a composer that I was
18 looking at the metadata.

19 Q You haven't seen any of the
20 metadata that was provided by Extreme
21 to any broadcaster, have you?

22 MR. MARDEROSIAN: I'm going
23 to object. It's vague and
24 overbroad.

25 Are you talking about the

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KOHN

hard drives that Kelsey Dewald testified to? Is that what you're talking about, the electronic information that Extreme, even your own expert said Extreme provided to the broadcasters? Is that what you're asking him, the actual hard drives? Because they haven't been produced in this case.

MR. ZAKARIN: I understand.

Q You can answer the question. Have you seen any of the metadata that was supplied by Extreme either through hard drives or on its website to any broadcaster?

MR. MARDEROSIAN: I'm still going to object as vague.

MR. ZAKARIN: You can answer.

MR. MARDEROSIAN: And compound.

A I'm thinking now back to a woman named Kelsey.

Q Who's that?

1 KOHN

2 A Kelsey -- there was a
3 deposition by a Kelsey. I can't
4 remember if that's her first name or
5 last name, where she was talking about
6 the responsibility when the metadata
7 management was in the UK by Extreme.

8 Q Now --

9 A And that was changing all the
10 time. So I think about that, and I
11 wonder what you mean by which metadata.

12 There's lots of metadata that
13 could be used to produce and to give
14 information to broadcasters. When I
15 see a cue sheet, usually it is
16 comprised of entries that are taken
17 from metadata. So to answer your
18 question when I'm looking at the cue
19 sheet and I see errors that seem to me
20 were either the result of manipulated
21 metadata intentionally or someone
22 intentionally eliminating the
23 composer's name, I don't know what to
24 make of it.

25 So have I seen hard drives of

1 KOHN

2 anything? No. Hard drives were not
3 given to me. Generally when you get
4 metadata, it can be in the form of a
5 electronic spreadsheet file. I've had
6 a lot of spreadsheets sent to me in the
7 course of my report that I've taken a
8 look at. I'm not sure which one might
9 have been the metadata that you're
10 talking about.

11 Q So you don't know if you've
12 seen any metadata; is that right?

13 MR. MARDEROSIAN: Objection.
14 That's misstating the
15 testimony, the answer just given.

16 It's argumentative as well.

17 Q You can answer.

18 A I've already answered that
19 question.

20 Q No. You can answer the
21 question now.

22 A I've already --

23 Q You don't get to decide.

24 A I've already answered it.

25 Q So you're refusing to answer

1 Kohn

2 the question?

3 A No, I already answered the
4 question.

5 Q Well, I asked you a different
6 question. If you don't want to answer
7 it, just say so.

8 MR. MARDEROSIAN: Mr. Zakarin
9 ,you're arguing with the witness.
10 He told you that he answered the
11 question. If you disagree, you
12 must take it up with the court.

13 MR. ZAKARIN: I will.

14 Q Now Mr. Kohn, have you gone
15 onto the website of Extreme and
16 examined any of the metadata?

17 A Yes. Well, I've gone onto
18 the website of Extreme; and I've done a
19 number of searches. And if you've seen
20 ISRC codes -- I'm sorry --

21 COURT REPORTER: I'm sorry?
22 ISRC codes?

23 A ISW -- ISWC codes, perhaps
24 ISRC codes. So if -- that is typically
25 part of metadata. So that if you're

1 KOHN

2 asking whether I've seen metadata on
3 the website, the answer is yes.

4 Q Okay. Have you seen any
5 metadata on the website with respect to
6 the Marderosians' works that improperly
7 identifies the composers, the title of
8 the work, the publisher or the PRO?

9 MR. MARDEROSIAN: I'm just
10 going to object as vague and
11 overbroad.

12 A I think it's also too narrow
13 because I don't know what ISRC code and
14 what ISWC code I was seeing -- looking
15 at. But in Dan Pounder's deposition --
16 I'm sorry -- in Dan Pounder's
17 declaration that was attached to a
18 motion to dismiss or objection to a
19 motion to dismiss, I'm not sure which
20 it was, I guess it was the motion to
21 dismiss, he talks about that there was
22 flaws in the metadata. He doesn't
23 explain what caused the flaws in the
24 metadata. That was changing over a
25 period of time, according to this woman

1 KOHN

2 Kelsey. But that had to be fixed. I
3 don't know what --

4 Q But --

5 A I don't know -- I started
6 working on this case last February.
7 And I don't know when that declaration
8 was filed. I don't know when the
9 metadata was fixed. So it was -- so I
10 don't --

11 Q Go ahead.

12 A You know, I'm trying to get
13 back to your question and I'm kind of
14 looping back and finding nothing. So
15 go ahead.

16 Q So it's your recollection, as
17 long as you brought it up, that
18 Mr. Pounder said that the metadata or
19 the -- or something was wrong with the
20 IWC code?

21 MR. MARDEROSIAN: Objection.

22 A That's my recollection.

23 Q As opposed to him saying that
24 the outward facing website did not have
25 the accurate information but that the

1 KOHN

2 inside website had the information.

3 You don't recall what he
4 said?

5 MR. MARDEROSIAN: I'm going
6 to object. It's vague.

7 Q Is it --

8 MR. MARDEROSIAN: Vague and
9 overbroad.

10 MR. ZAKARIN: I'll withdraw
11 the question.

12 Q Is it your -- do you recall
13 what it was that he actually said in
14 his reply affidavit?

15 A I'm telling you now that I,
16 and I think I said it earlier, I
17 vaguely recollect him saying something
18 about flawed metadata in his
19 declaration. I don't remember
20 precisely what he said in his
21 declaration.

22 Q Okay.

23 In terms of the, you know,
24 cue sheets that you've seen that have
25 some erroneous information, have you

1 Kohn

2 erroneous cue sheets that you
3 reference -- you recall referencing
4 some erroneous cue sheets?

5 MR. MARDEROSIAN: He didn't
6 say some. You're arguing again.

7 MR. ZAKARIN: One. You want
8 to make --

9 MR. MARDEROSIAN: Don't argue
10 the case. Just ask the question.

11 Q You have seen more than one
12 erroneous cue sheet?

13 A You mean cue sheets that
14 contained --

15 Q Mistaken information or
16 incomplete information, one or the
17 other.

18 A Or manipulated information.

19 Q You -- we'll talk about
20 whether it's manipulated. You're
21 drawing a conclusion on manipulated,
22 aren't you?

23 A You're drawing a conclusion
24 on mistaken.

25 Q When I say that that they

1 KOHN

2 didn't have corrected --

3 A I don't know whether --

4 Q -- they didn't have correct
5 information. I'm not making a value
6 judgment as to intent, manipulation,
7 how it got there. I'm simply dealing
8 with a cue sheet that did not have
9 either complete or accurate
10 information.

11 A The word mistake will connote
12 innocence. And I don't see, given the
13 cue sheets that I've looked at, the
14 ones that had incorrect -- I mean
15 literally way off the charts incorrect
16 information would seem to me coming
17 from metadata that one of the
18 depositions say was manipulated in the
19 UK by somebody.

20 I have seen a number of cue
21 sheets. I've seen lots of things
22 produced to me. I've looked at cue
23 sheets, a whole slew of them, perused
24 them. And all I could say is I pointed
25 out the ones that, as I did in my

1 Kohn

2 report, and Mick's produced to your
3 expert witnesses yesterday a number of
4 them that say the composer's name is
5 Mix Tape, which is the name of the
6 library.

7 Q Okay.

8 Now, do you know how Mix Tape
9 got listed there? Do you know?

10 MR. MARDEROSIAN: Objection.

11 Vague and overbroad.

12 A I have no personal
13 knowledge --

14 Q Okay. Did you --

15 A -- of how the word --

16 Q Go ahead, please.

17 A -- Mix Tape gets in there. I
18 have my suspicions, but I have no
19 personal knowledge of how it got there.

20 Q So you didn't go to --

21 MR. MARDEROSIAN: Are you
22 done with your answer?

23 A Yes, I am.

24 Q You didn't go to the
25 broadcaster and ask, did you? Yes or

1 KOHN

2 no?

3 A I didn't go to the
4 broadcaster -- which broadcaster?

5 Q The broadcaster that had the
6 mistaken or the incorrect information
7 on the cue sheet?

8 A Well, I don't know whether it
9 was the broadcaster who produced the
10 cue sheet or whether it was the
11 producer who produced the cue sheet.

12 Are you assuming --

13 Q Did you go to the producer?

14 MR. MARDEROSIAN: Hold on.

15 Go ahead.

16 Q Did you go to the producer?

17 A I didn't go to -- I didn't go
18 to anyone on the outside to ask them
19 who produced.

20 Q Okay. Did you go to Extreme
21 and ask them?

22 MR. MARDEROSIAN: Wait a
23 second. Hold on, please.

24 Okay. I object to the
25 question.

1 KOHN

2 You mean, did he go to your
3 client and have a discussion with
4 your client?

5 MR. ZAKARIN: Yeah, did he
6 inquire of anybody?

7 A I looked at the evidence that
8 was presented to me. And there is
9 clear evidence from someone who works
10 for Viacom that the metadata was
11 changed and manipulated in the UK. All
12 right? And it seems to me that the
13 misinformation that you're saying is in
14 these cue sheets or however you want
15 to -- incorrectly putting a name of
16 your client's library as the composer
17 name, gets there through information
18 provided to the broadcaster or the
19 producer. That's generally how it gets
20 there.

21 I can't imagine how a
22 broadcaster or producer would confuse a
23 composer's name with the name of a
24 library or the word Mix Tape.

25 Q So --

1 KOHN

2 A But, no, I haven't had any --
3 make any phone calls to your client.

4 Q But you've concluded that the
5 person filling out the cue sheet could
6 not have possibly made an honest
7 mistake; is that your testimony?

8 MR. MARDEROSIAN: Hold on.

9 I'm going to object to the
10 question.

11 This is calling for
12 speculation. It's argumentative.
13 It's vague and overbroad.

14 MR. ZAKARIN: Everything the
15 witness has testified to in the
16 last 20 minutes has been rank
17 speculation. Why should we stop
18 now?

19 MR. MARDEROSIAN: Incorrect.

20 Don, stop arguing the case.
21 Kelsey Dewald testified that from
22 Santa Monica Russel Emanuel and
23 Dan Knight continually changed the
24 metadata that went to the
25 broadcasters.

1 KOHN

2 A It would -- it sounds
3 consistent.

4 Q Now, what I want to
5 understand is the factual basis for
6 your statement. Let's -- these are a
7 couple of statements. Let's deal with
8 the last one.

9 It is the custom and practice
10 of music publishers to review cue
11 sheets for accuracy and correct any
12 mistakes. This is true of even
13 publishers who consider themselves to
14 be production music libraries.

15 What's the factual basis for
16 your statement of that being the custom
17 and practice?

18 A The -- in terms of production
19 music libraries, I actually didn't
20 mention earlier that I meant to do, but
21 I -- I first learned the word -- what
22 the word "cue sheet" was when sitting
23 with my uncle who actually had a stack
24 of them and he explained to me what
25 they were. And he was -- he was

1 KOHN

2 reviewing them.

3 I don't have any specific
4 recollection of what they -- where they
5 were from and where they got them. It
6 was actually paper that he got. It
7 would have -- back in the '80s. Then
8 maybe ASCAP would have sent it to him.
9 But if he didn't make sure that the cue
10 sheets were filed properly with ASCAP,
11 he wouldn't have gotten the performance
12 money on the back end, which is what he
13 was explaining to me. Because he
14 talked -- he told me what a needle drop
15 was. That he might charge \$200 for a
16 needle drop. And I go that doesn't
17 sound like a lot of money. How do you
18 make money on this? And he says I get
19 it all in the back end. And that
20 morning he had a stack of cue sheets,
21 whatever. And I didn't quite fully
22 understand it at the time. Maybe over
23 the years I got a better understanding
24 of that.

25 Q Who else --

1 KOHN

2 A Now --

3 Q I'm sorry. I didn't want to
4 interrupt you.

5 A Just so it is on the -- as I
6 mentioned in the third bullet on the
7 this page, according to BMI without cue
8 sheets, it would be nearly impossible
9 for such composers and publishers to be
10 compensated for their work. The ASCAP
11 website says the same thing and
12 actually uses the term "production
13 music libraries" in the sentence.

14 COURT REPORTER: Uses the
15 term?

16 A Production music libraries in
17 the sentence.

18 Q Okay.

19 A So the ASCAP website says it.
20 The BMI website says it. Your client,
21 the CEO of Extreme in his deposition
22 said that's not something we do, they
23 do that over at Sony ATV.

24 Q Huh-uh.

25 A Yes, he did.

1 KOHN

2 Q That's not what he said.

3 A Yes, he did.

4 Q Okay.

5 A He said -- that's the job of

6 --

7 Q Whatever it says, it says.

8 A That's the job -- that's the
9 job of commercial publishers. The CEO
10 of Extreme said it himself. So one of
11 the basis of my customs and practices
12 is your own CEO saying in his
13 deposition that Sony ATV does it.

14 Dan Pounder in his
15 declaration said that we don't have the
16 resources to do it like Sony ATV does.
17 I read that. Okay?

18 So why don't you ask your own
19 client why they don't follow the
20 customs and practices of the industry
21 that their own parent company follows
22 as well. They say -- they chose not to
23 do it because they say they don't have
24 the resources. If they --

25 Q I'm sorry. I didn't want to

1 Kohn

2 interrupt you.

3 A So the basis -- I've been to
4 panels. I have discussed this with
5 people in the industry over the past 35
6 years since writing the book about how
7 to make sure -- the whole book is Kohn
8 on Music Licensing, there's a theme in
9 the book is that you shouldn't be --
10 that you should be willing to license
11 your music out there so that you get
12 the back end public performance
13 royalties. Everyone knows. It's plain
14 as sight. It's on the ABMI and ASCAP
15 websites. You can't be a production
16 music library or a music publisher and
17 miss it, that if you don't have cue
18 sheets on file, you're not going to be
19 getting the largest piece of the income
20 that music publishers make.

21 So for your client to say
22 bizarrely to me, bizarrely to the
23 court, bizarrely to the songwriters
24 that they represent that they don't
25 have any responsibility, and for you to

1 KOHN

2 bring in expert witnesses who dare --
3 the head of APM, okay, filed an expert
4 report in this case. He's a production
5 music library, and he denies any
6 responsibility.

7 Of course he's going to come
8 in -- you brought in an expert who's
9 the CEO of a production music library
10 to tell you what -- the practices in
11 the industry. Of course he's going to
12 say that we don't do it. That's not
13 the practice, because he doesn't want
14 to do the work.

15 You have -- you have
16 yesterday, the expert witness that you
17 brought in yesterday that I sat in on
18 and, that's Mr. Katz. He was on the
19 board of APM. He also acquired a
20 production music library called First
21 Com. And he sat there brazenly telling
22 Mr. Mardosian's [sic] --

23 Q Marderosian.

24 A -- Marderosian's client that
25 they have no responsibility either to

1 KOHN

2 do it. He's saying it's custom --
3 there's no custom and practice in the
4 industry.

5 If you read books like Todd
6 Brabec, who you called a putz the other
7 week at a deposition, which was
8 appalling and it was insulting to me
9 and the people that I know in the music
10 industry --

11 Q Uh-huh.

12 A -- in his book he says that
13 it's customs and practice in the music
14 industry. You don't have to be around
15 much to understand that it is custom
16 and practice for production music
17 libraries and music publishers as their
18 basic responsibility to make sure the
19 biggest source of income gets paid to
20 the songwriters.

21 Q Okay. Are you done?

22 MR. MARDEROSIAN: Well,
23 that's argumentative.

24 MR. ZAKARIN: I just wanted
25 to know because I don't want to

1 Kohn

2 interrupt the witness.

3 A I am done.

4 Q Oh, okay. Well, now we'll go
5 back.

6 So in addition to your uncle
7 who you sat with about 30 years ago and
8 he had a stack of cue sheets on his
9 desk, what other production music
10 libraries have you either talked to or
11 found out as a matter of custom and
12 practice reviewed cue sheets, any
13 others?

14 A I don't remember any others.
15 I met Adam --

16 Q Thank you. That's enough.

17 A I --

18 MR. MARDEROSIAN: Wait. What
19 do you mean that's enough?

20 MR. ZAKARIN: No, no, that's
21 enough.

22 He's answered it. He's
23 answered the question.

24 MR. MARDEROSIAN: No, he
25 hasn't.

1 KOHN

2 A No, I didn't say I didn't
3 talk to production music libraries. I
4 met Adam Taylor a number of years ago.
5 I don't -- I talked about his
6 production music library. I don't
7 remember having discussed with him, but
8 I might have discussed with him what he
9 does and how he does it. There are
10 lots of people -- how do you think I
11 wrote Kohn on Music Licensing?
12 Virtually every word in that book,
13 other than the forms, without having
14 discussed with everybody in the music
15 industry that I was in touch with
16 whether it was my uncle, my father,
17 Barry Massarsky sitting at the end of
18 the table, other people that I learned
19 from, what custom and practice in the
20 music industry are? How could I have
21 possibly have described terms of art?

22 Q Damned if I know.

23 A How can I sit here and give
24 you answers to your questions on issues
25 like Sound Exchange and other things if

1 KOHN

2 I didn't talk to a lot of people in the
3 music industry to know what a custom
4 and practice in the music industry is
5 or it isn't?

6 How does a federal judge in
7 Los Angeles in federal court accept my
8 testimony as customs and practice in
9 the music industry as to the
10 interpretation of the ASCAP contract
11 with respect to performances in venues
12 across the country?

13 Q Are you done? I don't want
14 to interrupt you.

15 A That's not the -- I was
16 obviously done.

17 Q I can't tell.

18 Now, so we've established
19 that you didn't talk to any production
20 music companies or find out what they
21 do --

22 A That's not true.

23 Q -- but you talked --

24 COURT REPORTER: I'm sorry.

25 You didn't talk -- I'm sorry.

1 KOHN

2 Talk to any --

3 Q Music production library
4 companies --

5 COURT REPORTER: Music
6 production library companies.

7 Q -- to find out what they do
8 as a matter of custom and practice?

9 A I -- that's not the
10 testimony.

11 Q Besides your uncle?

12 A That's not my testimony.
13 That's not my testimony.

14 Q It's what --

15 A No, it's not my testimony.

16 I have talked to production
17 music libraries, people who work for --

18 Q Who?

19 A I even met -- I can't tell
20 you the names of the companies. I
21 can't tell you the names of the
22 companies. I can't tell you the
23 individuals involved in those
24 companies. I told you I met with Adam
25 Taylor. That's one name that came up

1 KOHN

2 that I remember specifically.

3 How would I be able to write
4 about these things in the book without
5 having talked to people about what they
6 do for a living? And that's what I
7 did --

8 Q Do you write --

9 A -- for over 35 years.

10 Q -- do you write in the book
11 about the custom and practice of music
12 production library companies receiving
13 and reviewing cue sheets?

14 A No, I do not specifically --

15 Q Okay.

16 A -- cover in the book cue
17 sheets. I can't cover every single
18 custom and practice in the music
19 industry. Now I will. And in the next
20 version of the book, which will be
21 coming out next year, is going to be
22 talking about this. And I'm going to
23 use this as an example of how
24 songwriters can be mistreated by their
25 publishers, and particularly production

1 KOHN

2 music libraries not just for not
3 reviewing cue sheets but for the
4 shenanigans that have been going on in
5 this -- this case with your CEO.

6 Q I look forward to it. And
7 look forward to reading it. I may even
8 buy it.

9 Now --

10 A I would hope you --

11 Q -- did you contact --

12 A -- copyright.

13 Q -- any music publishers to
14 find out about whether they engage in
15 this custom and practice of receiving
16 and reviewing cue sheets? Any music
17 publishers, not production music
18 libraries, but music publishers? Have
19 you gone --

20 A I haven't --

21 COURT REPORTER: I need a
22 full question, please. If you
23 wait until he finishes --

24 Q Have you contacted -- right.
25 Have you contacted any of them to find

1 KOHN

2 out?

3 A Since I was engaged in this
4 case, no.

5 Q Did you do a survey of any
6 production music libraries or music
7 publishers?

8 A Since I've been engaged in
9 this case, no.

10 Q Did you do a survey before
11 you were engaged in this case?

12 A It depends on what you mean
13 by "survey." If it means that --

14 Q A survey to find --

15 A If it means that --

16 Q Let me finish.

17 You're asking me. So I'm
18 going to tell you.

19 A Go ahead.

20 Q A survey to determine whether
21 it's a custom and practice of music
22 publishers to receive and review and
23 correct cue sheets.

24 A You didn't define survey.
25 Try again.

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KOHN

Q Do you want to know what a survey is?

A Yes.

MR. MARDEROSIAN: Okay.
We're getting conversational again.

MR. ZAKARIN: No, no.

MR. MARDEROSIAN: Maybe we need -- maybe we need another break.

MR. ZAKARIN: No. No break.

A We don't need a break.

MR. MARDEROSIAN: Hold on everybody. Let's go back to questions and answers.

MR. ZAKARIN: I want to know what the witness means by survey. That's all.

MR. MARDEROSIAN: So, Don, he told you about what he went through in writing his book and the people that he talked to.

MR. ZAKARIN: I heard him.

MR. MARDEROSIAN: Now, you

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KOHN

used the word "survey." He's asking you to define what you mean by survey so he can answer your question.

Q Yeah. Did you -- did you submit questionnaires to music publishers -- you didn't talk to them -- but did you submit questionnaires or some sort of document to music publishers or production music libraries to find out if they engaged in this custom and practice of reviewing --

A I --

Q -- receiving, reviewing and correcting cue sheets?

A I submitted questionnaires, no more than the expert witnesses that you have put forth have submitted questionnaires to provide answers to their questions.

Q So the answer is no?

A That's right.

Q Okay. That's all we need to

1 KOHN

2 know.

3 Now, on Page 8 -- we're going
4 back for a second. You talk about the
5 50 percent of gross receipts, correct?

6 A I'm sorry? Where do I talk
7 about it?

8 Q Page 8, you talk about, in
9 the second bullet point. It's the
10 50 percent of gross receipts. I'm just
11 trying to orient you. The obligation
12 to pay 50 percent of gross receipts.

13 A Correct. Based on Page 8.

14 Q Page 8, the second bullet.
15 I'm just trying to --

16 A Got it.

17 Q -- work with -- you know, I'm
18 just trying to orient the witness.
19 Okay.

20 Now, under Exhibit 3, K3, the
21 payment of gross receipts is not
22 unlimited. There are conditions,
23 aren't there?

24 MR. MARDEROSIAN: Objection.

25 Calls for a legal opinion and

1 KOHN

2 MR. MARDEROSIAN: I have to
3 make objections if the questions
4 aren't proper questions.

5 Q On Page 9, in the middle of
6 the page, it says, music publishers
7 where they can have influence over the
8 titles of songs will customarily
9 attempt to avoid duplicate titles to
10 avoid the obvious problem of
11 misdirected or suspended public
12 performance revenues.

13 Do you see that statement?

14 A You said page 9.

15 Q Page 9 of your report?

16 A Music publishers where they
17 can have influence?

18 Q Yes, that statement. Do you
19 see that?

20 A I'm reading it again. Yes.

21 Q Is it your testimony that
22 this is another custom and practice in
23 the industry?

24 A I am aware over many yours
25 that one of the problems that the

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KOHN

industry faces in allocating income,
particularly blanket income, was the
problem of duplicate titles. And there
have been lots of ways that performance
societies and others have tried to deal
with that problem. So I'm aware that
it's a problem and that -- I'm aware
that there are publishers who try to
avoid duplicate titles where they can.
It's not always up to them.

So I would say that it's a
custom and practice in the industry to
avoid duplicates where practical.
Sometimes it's the songwriter. He's
going to do what he wants to do. There
are publishers who have always insisted
that the first three words of the song
is going to be the title. There was
this guy Jerome, I don't know, Robbins
of Robbin's Music. So each publisher
has its own, sometimes, quirkiness. As
metadata improves over time, that may
not be a problem anymore.

Q You're aware that titles are

1 KOHN

2 not copyrightable?

3 A It doesn't mean they're that
4 not protectable. There is the Thomson
5 versus Walt Disney case in California
6 where unfair competition or palming
7 off -- the Lovebug case in which a
8 California court held that under unfair
9 competition law or palming off the
10 titles could be protectable as in the
11 form of a trademark under unfair
12 competition but not copyrightable.

13 Q Yes, I know that.

14 Have you either spoken with
15 or surveyed any music publishers that
16 told you that they will customarily
17 change titles to avoid duplicates?

18 A I think -- I don't know
19 whether it was music publishers that I
20 learned the problem from or people in
21 the -- PROs. But in discussions that
22 I've had over 35 years, I've come to be
23 aware that duplicate titles have been a
24 problem and it would be good if we
25 could try to avoid them where possible.

1 KOHN

2 Q You're aware that the PROs
3 have thousands of songs that have the
4 same title?

5 A Yes.

6 Q Did you ask any of the PROs
7 whether those thousands of common
8 titles present an obvious problem for
9 them in allocating income?

10 A I have -- since the beginning
11 of this case, no.

12 Q Did you ask them before the
13 beginning of this case?

14 A I might have been on panels
15 that might have talked -- that's
16 probably -- may have been where I have
17 heard that it is a common problem or it
18 was a common problem 20 years ago
19 before the automation of cue sheets
20 through RapidCue and other kinds of
21 systems. Things change over time.

22 MR. MARDEROSIAN: Don, you
23 are aware your own expert, Adam
24 Taylor, says his company does not
25 change titles, right? Was that

1 Kohn

2 included in your question of
3 evidence?

4 MR. ZAKARIN: I'm fully aware
5 of it. Adam Taylor, they don't
6 change duplicators either.

7 MR. MARDEROSIAN: Yeah, they
8 don't change titles.

9 MR. ZAKARIN: They don't
10 change duplicates.

11 MR. MARDEROSIAN: I think the
12 specific phrase in his report is
13 his company does not change
14 titles.

15 MR. ZAKARIN: Yes.

16 MR. MARDEROSIAN: At all.

17 MR. ZAKARIN: And it's
18 explained.

19 MR. MARDEROSIAN: I just want
20 to make sure that that was
21 included.

22 MR. ZAKARIN: It's explained
23 why.

24 A I read Adam's report, and I
25 remember him saying that.

1 KOHN

2 Q I'm well aware of Adam's
3 report as well.

4 And you're also aware that
5 publishers like Warner Chappell, BMI,
6 UMPG, Sony ATV, just by way of example,
7 have multiple songs in their catalogs
8 with the same titles?

9 MR. MARDEROSIAN: Objection.

10 Vague. Overbroad.

11 Incomplete hypothetical.

12 Assumes facts not in
13 evidence.

14 A I trust that they do since
15 there are so many duplicate titles at
16 the PROs that they could be from the
17 same music publishing company.

18 Q And you read Adam Taylor's
19 report. You said that?

20 A Yes.

21 Q So by way of example I think
22 Adam Taylor's report reflects that APM
23 has four titles of Mulholland Drive,
24 separate songs in its own catalog.

25 Do you recall that?

1 KOHN

2 A I don't remember that
3 specifically, but...

4 Q Now if duplicate titles is,
5 as you say in your opinion, an obvious
6 problem, do you have any understanding
7 as to why BMI or ASCAP or the major
8 publishers have not done something to
9 eliminate this problem over the past 75
10 years?

11 A I would -- I would say that
12 they're not necessarily in the position
13 to eliminate it. They're not in
14 control of who registers what titles or
15 not. And they are finding other ways
16 to deal with the problem.

17 Q To be clear it's not your
18 testimony, is it, that having
19 identically titled songs automatically
20 creates confusion and results in a loss
21 of performance income?

22 A Not automatically.

23 Q It can happen?

24 A Yes.

25 Q But it's not something that

1 KOHN

2 is caused automatically by duplicate
3 titles?

4 A Well, it could be caused --
5 well, it could be caused automatically
6 by a specific duplicate title but not
7 in general.

8 Q Have you had any
9 communication with any PRO regarding
10 the error rates on cue sheets that they
11 receive from either producers of
12 programming or broadcasters?

13 A No.

14 Q Do you have any knowledge on
15 your own as to what the error rate is
16 for ASCAP or BMI on the cue sheets they
17 get?

18 A No.

19 Q You understand, don't you,
20 that cue sheets are created one way or
21 another by music supervisors or other
22 people at either broadcasters or
23 programs?

24 MR. MARDEROSIAN: I'm going
25 to object. Excuse me. I'm going

1 KOHN

2 that they have people and staffs who
3 receive them. I'm not -- personal
4 knowledge of how they may review them
5 or not review them.

6 Q So you have no knowledge one
7 way or the another whether the PROs
8 review the cue sheets that they get and
9 if there's erroneous information or
10 incomplete information, how they deal
11 with it?

12 A I have no personal knowledge
13 of how cue sheets are received other
14 than electronically, you know, and
15 reviewed and handled by PROs. I have
16 not worked in the PRO. I don't know.

17 Q So that's not part of your
18 knowledge as to how the PROs function?

19 A Well, generally it's part of
20 my knowledge of how they function. I
21 know they receive cue sheets from
22 RapidCue. I don't think that's
23 generally known by a lot of people.

24 Q They also receive cue sheets
25 that are paper cue sheets or Excel

1 KOHN

2 spreadsheets from broadcasters and
3 program suppliers, don't they?

4 A Yes.

5 Q And indeed you've looked at a
6 lot of the cue sheets that they
7 received?

8 A That's correct.

9 Q By the way, I may have asked
10 this and I apologize, did you look at
11 all of the cue sheets that were -- that
12 BMI produced?

13 A No.

14 Q You only looked at some?

15 A Some.

16 Q Did you have access to all of
17 them?

18 A I think they were all sent to
19 me, yes.

20 Q Did anybody -- strike that.
21 I won't do it.

22 Have you ever suggested to a
23 music publisher that they perhaps
24 consider changing titles to avoid
25 duplicates?

1 KOHN

2 now. Go ahead. I'm good.

3 Q I just want to make sure
4 you're okay.

5 A I'm good.

6 Q Cue sheets are submitted with
7 respect to the first or initial
8 broadcast of a use, not for every
9 rebroadcast?

10 MR. MARDEROSIAN: Do we know
11 that to be the case, Don? Do we
12 know that to be absolutely the
13 case every time?

14 MR. ZAKARIN: I'm asking the
15 witness. I'm not asking you.

16 MR. MARDEROSIAN: I
17 understand. But you keep asking
18 it as if it is, and I don't know
19 if that is the case.

20 I'm just going to object that
21 the question is vague and calls
22 for speculation because we don't
23 really know what broadcasters do
24 in terms of -- from the initial
25 air to rebroadcast.

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KOHN

And I don't want to quarrel
with you, but I don't want you to
ask it as if that is the case.
He's not an expert on what
broadcasters do.

MR. ZAKARIN: It is the case
but I think the witness knows and
that's why I'm asking him.

MR. MARDEROSIAN: I'm not so
sure that is the case.

Q You can answer.

A I think we're in agreement on
the basic principle. I just will
continue to have a problem with your
saying that it's a -- for the first
broadcast not for the second broadcast
or the third broadcast or the fourth
broadcast. The cue sheet reflects the
music that has been synchronized into
an audiovisual work. That's it. It
may never be broadcast, and someone
could submit the cue sheet.

Q That is true.

A Right? So it has nothing to

1 KOHN

2 do with the first broadcast.

3 Q Unlikely a cue sheet would be
4 submitted if it's not broadcasted?

5 A That's correct. But I'm just
6 trying to be correct in the language.
7 And I'm not going to agree to something
8 that I don't think is precise from a --

9 Q I don't want you to agree
10 with anything unless you agree with it.

11 A Good.

12 Q So but you would agree with
13 me that broadcasters program suppliers
14 do not submit cue sheets each and every
15 time that the same program is
16 rebroadcasted or the same promo is
17 rebroadcasted?

18 MR. MARDEROSIAN: I'm going
19 to object.

20 It's vague and overbroad.
21 Incomplete hypothetical. Assumes
22 facts not in evidence. Asking for
23 speculation.

24 Q Now you can answer.

25 MR. MARDEROSIAN: And outside

1 KOHN

2 the scope of this expert's report.

3 A Well, yeah, it could be
4 outside of my --

5 Q I don't think it is, but go
6 ahead and answer.

7 A The way you put it, yes.

8 Q Are you aware that the PROs
9 actually do track rebroadcasts of
10 programs through such things as
11 Gracenote or surveys?

12 A They have a number of methods
13 that they use for tracking. They
14 use -- some of them use TuneSat.

15 Q I think SESAC.

16 A SESAC does.

17 Q But I'm not sure what they
18 use TuneSat for?

19 A SESAC and SOCAN, I think, do.

20 Q SOCAN is Canada.

21 A Well, what can I tell you,
22 it's a PRO. You said PRO.

23 Q Now, has anybody ever told
24 you that every TuneSat detection is a
25 unique initial broadcast of a

1 Kohn

2 performance, of a song?

3 MR. MARDEROSIAN: A unique
4 initial broadcast.

5 MR. ZAKARIN: That's what I
6 said.

7 MR. MARDEROSIAN: A first
8 airing?

9 Q A unique initial broadcast.

10 MR. MARDEROSIAN: I'm going
11 to object.

12 It's vague an overbroad.

13 Incomplete hypothetical.

14 A Has anyone ever told me what?

15 Q Have you ever been told that
16 each and every TuneSat detection is a
17 unique initial broadcast rather than
18 multiple rebroadcasts of the same
19 program or promo?

20 MR. MARDEROSIAN: Same
21 objection. And I'll add compound.

22 A No one's told me that.

23 Q Okay.

24 Your understanding is, isn't
25 it, that the TuneSat detections are --

1 KOHN

2 include multiple rebroadcasts?

3 A Include multiple public
4 performances of an audiovisual work
5 that contains musical works. How's
6 that?

7 Q I don't think that's --
8 that's entirely it. It's multiple
9 public performances. When you say
10 multiple public performances, are you
11 referring to multiple rebroadcasts of
12 the same program?

13 MR. MARDEROSIAN: Object.

14 It's an incomplete hypothetical.

15 It's vague and overbroad.

16 A I'm just weary of the word
17 rebroadcast because it's an
18 audiovisual -- well, you've got
19 broadcasts. You've got transmissions
20 for over the internet. I don't think
21 that TuneSat --

22 Q I'm going to give you a
23 hypothetical. Maybe we can cut through
24 it.

25 A It's just the word broadcast

1 KOHN

2 that's bothering me and rebroadcast
3 that's bothering me. The copyright law
4 in the compulsory license for cable,
5 there's rebroadcast, there's -- I have
6 trouble with the word. But it's just a
7 semantical thing. I'm not trying to be
8 difficult.

9 Q I'm sure you're not. I'm
10 trying -- I'm going to try and make it
11 simple. I'll give you a hypothetical,
12 okay?

13 A show goes into syndication.
14 A show is broadcast -- a new show, CBS,
15 Big Bang Theory, music on Big Bang
16 Theory, original broadcast on CBS goes
17 in syndication and it's rebroadcasted
18 on Turner, it's rebroadcasted on
19 Channel 9, it's rebroadcasted all the
20 ways. So there's thousands of
21 rebroadcasts of the same original
22 initial show. TuneSat detections will
23 pick up every one of those performances
24 of the show on -- not of the show, but
25 of the music in the show on CBS, it

1 KOHN

2 will pick up the original one. It will
3 pick it up on Turner.

4 A Yes.

5 Q It will pick it up on all the
6 syndications.

7 A Okay. Yes.

8 Q You agree with me?

9 A Yes.

10 Q So the TuneSat detections
11 don't correspond to the original
12 broadcast only. They have all the
13 other showings of the same program?

14 A But you can use the TuneSat
15 data to determine how many unique
16 broadcasts were of those programs.

17 Q You can?

18 A Yes.

19 Q But unfiltered if you just
20 look at a sheer number of TuneSat
21 detections?

22 A Unfiltered, yes.

23 Q But if you look at -- if you
24 have 15 or 20,000 TuneSat detections,
25 you'd have to examine it to see which

1 KOHN

2 are rebroadcasts, which are the
3 original broadcasts, correct?

4 A You want to put it that way,
5 yeah. Which is the unique program that
6 contains the musical work, how many of
7 those versus how many times it was
8 rebroadcast or broadcast, yes. Yes.

9 Q And same thing for promos?

10 A Unfiltered, yes.

11 Q Okay.

12 I didn't it was
13 controversial.

14 A No, it's not.

15 Q I'm glad we got to --

16 A I just want to make sure you
17 don't --

18 Q I'm glad we got to an
19 agreement on terminology.

20 A Okay. Good.

21 MR. MARDEROSIAN: Actually it
22 sounds like you got to an
23 agreement on the validity of
24 TuneSat data.

25 MR. ZAKARIN: Thanks, Mick.

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KOHN

commercial and the Starbucks commercial
in there. I might have found it. I
might have listened to it, but I don't
remember.

But I poked around it to see
what was there but I did not do what
you had asked me. And I did not do a
calculations as to how much were this
kind and how much were that kind.

Q Turn to Exhibit B of your
report, if you would.

(Whereupon, a brief recess
was taken.)

Q Okay.

I think when we broke, I had
asked you to look at your Exhibit B --

A Yes.

Q -- to your report. Do you
recall? Pull it out.

A Okay. Exhibit B.

Q And you say these are unique
TuneSat detections?

A That's what the title of it
is.

1 KOHN

2 Q Are they unique?

3 A Yes. That's my understanding
4 of what they are. I didn't produce
5 these.

6 Q You didn't --

7 A No.

8 Q -- create this document?

9 A No.

10 Q So somebody else created it,
11 and told you what it was?

12 A Well, I was given it by
13 attorneys; and I understand that Karen
14 Rodriguez had prepared it.

15 Q Okay.

16 And the total number of
17 detections when you add them up are
18 about 21, nearly 22,000, correct?
19 You've got 6,848 and 15,093.

20 A Fifteen plus six, yeah, about
21 22,000, something like that.

22 Q I said about 22,000 or close
23 to 22,000.

24 And you multiplied \$200
25 against every one of these detections?

1 KOHN

2 A Yeah.

3 Q But you don't know if these
4 are unique detections, correct?

5 A Well, it says unique
6 detections. And I understood them to
7 be unique detections. I had previously
8 given a back of the envelope done in my
9 own way, way back in February when I
10 started working on the case and using
11 data that went all the way back to 2013
12 or something like that. And -- like I
13 said. So when I saw these numbers I
14 said it's in the realm of -- again, I
15 did back of the envelope and I just
16 took these as what it was.

17 Q But now they've gone up by
18 some nearly 7,000 from your number?

19 A Apparently.

20 Q And you don't know whether
21 they are or not unique detections?

22 A I'm not the one who generated
23 this. So I don't know whether they're
24 unique in the way that you and I have
25 been talking about my understanding of

1 KOHN

2 what unique is.

3 Q Do you know how many of these
4 detections -- I assume you're going to
5 know the answer -- are Viacom
6 detections, detections of broadcasts on
7 Viacom networks?

8 A I could do that.

9 Q You could pull it out from
10 the list?

11 A Right. Like MTV Classic is
12 MTV2. MTV -- we can probably pull out
13 and add the numbers up.

14 Q So we can add up what the
15 total number of MTV detections are?

16 MR. MARDEROSIAN: Well, he
17 said he did not prepare this.

18 MR. ZAKARIN: I understand.

19 MR. MARDEROSIAN: And I think
20 that's a question for Karen
21 Rodriguez.

22 MR. ZAKARIN: Well, the
23 problem is it's attached to his
24 report.

25 MR. MARDEROSIAN: I think

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KOHN

just to be fair about it, I think he relied on it on a specific narrow topic in his report, Don. And that was the extent of his use of this document.

But you can ask whatever you want, but I think these are questions for Karen Rodriguez.

MR. ZAKARIN: Unusually, you know, I ask witnesses about their reports and other witnesses about their reports. And if he relied upon somebody else to do something and he's basically just, in effect, saying what somebody has told him, I'm entitled to know that. That's all.

MR. MARDEROSIAN: I get that, absolutely. But the operative phrase is do something and I'm saying you should ask him what it is that he used it for.

MR. ZAKARIN: I know what he used it for. It's in his report.

1 KOHN

2 Anyway, let's continue on.

3 Q In terms of -- so we could
4 figure out which are Viacom channels
5 and therefore which are Viacom
6 detections, correct?

7 A Yes, if we knew what Viacom's
8 channels are.

9 Q For which you applied \$200
10 for each and every one of the
11 detections, correct?

12 A Well, are you just saying the
13 same thing for each -- yeah, I used the
14 total numbers here and multiplied it by
15 \$200.

16 Q And in terms of these
17 detections, do you know how many are
18 not works that were delivered to Viacom
19 Extreme but are owned by others
20 including the plaintiffs?

21 MR. MARDEROSIAN: Objection.
22 Vague.

23 Q You know that the plaintiffs
24 self-published works, right?

25 A Yes.

1 KOHN

2 Q Do you know how many of these
3 detections are of the plaintiffs'
4 self-published works?

5 A I think -- I didn't generate
6 this. So I don't have the underlying
7 data that was used to generate this. I
8 wouldn't be able to answer any of those
9 questions.

10 Q You with agree with me though
11 that there's no reason to charge or
12 make a claim against Extreme or Viacom
13 for \$200 per each of the plaintiffs'
14 own works?

15 A No.

16 Q Okay.

17 A Absolutely not.

18 Q So if the plaintiffs'
19 self-published works or works published
20 by third parties are among these
21 detections --

22 A Right.

23 Q -- they have --

24 MR. MARDEROSIAN: Hold on.

25 Let him finish the question

1 Kohn

2 because I want to object to it
3 before you agree to it.

4 Q -- they have to get backed
5 out?

6 MR. MARDEROSIAN: I'm going
7 to object.

8 It's an incomplete
9 hypothetical, and it doesn't
10 include the fact that there's
11 evidence that Extreme is taking
12 Aron and Robert's own publishing
13 for Lonely Orchard and Brothers
14 Heathen.

15 Q You can answer my question as
16 opposed to the rhetoric there.

17 A My understanding is that
18 these were unique detections of
19 music -- musical work, sound recordings
20 that were created by Aron and Rob and
21 delivered under the contract.

22 Q But in fact you don't know
23 whether these were, in fact, delivered
24 or are self-published?

25 MR. MARDEROSIAN: I'm just

1 KOHN

2 going to object.

3 It's an incomplete
4 hypothetical and vague.

5 Q You can answer.

6 MR. MARDEROSIAN: And doesn't
7 include the issue over whether or
8 not Extreme is taking the
9 plaintiffs' published --
10 self-published songs.

11 A And I don't know whether this
12 is an underrepresentation and doesn't
13 include all of their songs that were
14 delivered and used.

15 Q So you don't know very much
16 at all about this document?

17 A That's right.

18 Q Essentially, what you did is
19 you took the number of detections
20 without knowing what they are and
21 multiplied each one by 200?

22 A And that wasn't the essential
23 part of my report. The essential part
24 of my report was coming up with the
25 \$200 figure. If this wasn't included,

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KOHN

it wouldn't have mattered because
whichever the true number is would be
multiplied by \$200. If it was --
instead of 21,000, if it was 16,000, if
it was 30,000, whatever that number is.
And I'm sure enough good minds can get
together and figure out using the
TuneSat data what the proper number is.

Q We'll come to the 200 in due
course.

In any event, if I understand
you correctly you -- it's your view
that the 200 is the right number for --
for these -- for all of those
detections, that's your opinion?

MR. MARDEROSIAN: Right
number for what?

Q The right number for the sync
fee for each of these 200 detections
that you have opined?

A My report says what it says
about the \$200 number. We can turn to
it. I don't want to say anything
that's inconsistent and be --

1 KOHN

2 the NY9 and got \$200 for the promo for
3 it.

4 Q Is the \$10,000 that you put
5 in there, is that also in your Exhibit
6 B? Is it the same use as Exhibit B?

7 A I don't know.

8 Q So you could have a
9 duplication there?

10 A I might have a duplication.

11 Q You don't know that?

12 A Neither do you. I don't know
13 whether I do.

14 Q Not my burden.

15 Did you -- by the way on your
16 Exhibit B, did you back out what was
17 actually paid on any of those licenses?

18 A I was not asked to do that.

19 Q Okay.

20 So you were just asked to
21 come up with a gross number and put
22 that forward as the damage claim?

23 A I was asked to come up with
24 the \$200 amount. All right. I was
25 given the unique numbers. I did the

1 KOHN

2 multiplication. It was towards the end
3 of this. I didn't have the information
4 to back it out. And I wasn't provided
5 to -- but it. But it could be backed
6 out by somebody else.

7 Q Lots of things could be done,
8 but it wasn't done. So this is put
9 forth -- you're aware that you've put
10 this forth as a damage claim, \$200
11 times 20 -- almost 22,000 detections?

12 A Well, I also said to you that
13 I'm not the one who came up with the
14 22,000 detections. All right?

15 Q Is it your testimony --

16 A Somebody -- you know,
17 somebody else came up with that number
18 and I came up with the \$200. I made a
19 multiplication of the two numbers. One
20 number I came up with. Another number
21 somebody else came up with, and that's
22 what I put in here.

23 Q At the bottom of -- here,
24 based on my calculations, Page 86, Aron
25 and Rob share of these broadcast

1 KOHN

2 licensing fees for the 15,093 unique
3 audiovisual works, it's really almost
4 22,000 --

5 A Yeah.

6 Q -- in which their music was
7 suffixed for the period spanning
8 July 1, 2014 to August 1, 2018 is
9 \$2,194,100.

10 That's put forth as a damage
11 claim. Are you aware of that?

12 A I'm not familiar with the
13 term damage claim as litigators use it.
14 So I --

15 Q Are you aware that that is
16 part of the plaintiffs' claim that they
17 have supposedly been deprived of that
18 money?

19 A Yes.

20 Q Okay.

21 And you don't know whether
22 what they were actually paid is or is
23 not backed out of that number?

24 MR. MARDEROSIAN: It calls
25 for speculation. This is not his

1 Kohn

2 role.

3 A Yeah. I --

4 Q It's in his report.

5 A I wasn't asked to back it
6 out.

7 MR. MARDEROSIAN: Your
8 question on this topic is not in
9 his report.

10 You're mischaracterizing the
11 evidence.

12 MR. ZAKARIN: Well, we'll
13 see.

14 Q And you don't know whether
15 that 2,194,000 duplicates your other
16 number in Exhibit A in any respect, do
17 you?

18 MR. MARDEROSIAN:
19 Mischaracterizes the evidence.
20 Vague. Incomplete
21 hypothetical.

22 A So if we backed out -- how
23 many uniques are on Exhibit A? Can we
24 count them? Two, four, six, ten, maybe
25 30.

1 KOHN

2 said it's inconsistent with customs and
3 practices, correct?

4 A Yes.

5 Q Okay.

6 A Not just that but --

7 Q You've said the contract and
8 customs and practices.

9 A Right.

10 Q Let's deal with customs and
11 practices first.

12 In terms of the customs and
13 practices of production music libraries
14 in determining how they allocate
15 blanket licenses, did you contact any
16 production music libraries to find out
17 how they did it?

18 A Excuse me. I was distracted.

19 Q I'm sorry.

20 MR. ZAKARIN: Why don't we
21 reread the question, please.

22 (Whereupon, the record was
23 read.)

24 A Not since I was engaged in
25 this case.

1 KOHN

2 Q Did you do it before?

3 A I learned it through 35 years
4 of discussing it with people, at least
5 the past ten years of discussing it
6 with people in the industry.

7 Q Who did you discuss it with
8 over the last ten years, can you
9 identify anybody?

10 A No, I can't -- no, I can't
11 identify any specific person.

12 Q And since you were retained,
13 you didn't talk to anybody?

14 A Well, I'm trying to think --
15 no, since I've been retained, I didn't
16 need to.

17 Q And you can't identify any of
18 these people in the production music
19 library --

20 A Well --

21 Q Let me finish. It will be
22 clear if I finish.

23 A You started a question before
24 I finished the last answer. But answer
25 your -- ask your question.

1 KOHN

2 Q You can't identify anybody
3 that you've spoken with since you were
4 retained to discuss that issue. And
5 I'm asking you, you can't identify any
6 of the people that you spoke with who
7 were in the production music library
8 business in the ten years prior to your
9 retention; is that right?

10 A Look, where did I say in
11 these two sentences -- where are the
12 words production music library here?
13 That the first thing we have to do is
14 going from top down not from bottom up.

15 Q You're talking about customs
16 and practice in the industry, right?

17 A Yes.

18 Q What industry are you talking
19 about?

20 A The entire industry. The
21 entire record industry. Let's go back
22 to what I --

23 Q We're not in the record
24 industry.

25 A This is just a summary. This

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KOHN

is just a summary. Let's go back to the section of my report where I discuss this. You will have to help me here.

MR. MARDEROSIAN: Take your time.

A Okay. I think it's Page 71. Okay?

Q Yes.

A All right.

So you're going to ask me a series of questions about who talked I to and since I didn't talk to -- I can't remember who I talked to, it's not fair to me at all.

So it really is on Page 76.

Q Okay.

A Where I give a number of examples. I start with, I believe -- and after I discuss the PROs usage if ASCAP or BMI allocated --

Q Where on 76 is this?

A I think I'm going back to 74.

Q Okay. Now we're on 74.

1 KOHN

2 A I'm sorry. I may have
3 misspoke.

4 Q PRO is like ASCAP and BMI?

5 A PRO is like ASCAP and BMI.
6 What I'm --

7 Q I see it.

8 A -- I'm saying here is it
9 would be unfair and unreasonable for
10 ASCAP or BMI to distribute income based
11 upon the number of songs and their
12 respective repertoire because a vast
13 number of songs in the catalog, which
14 may never be performed, would receive
15 the same share of income as frequently
16 performed songs.

17 Q Now, we're not talking --

18 A No, no.

19 Q You're still talking. Go
20 ahead.

21 A I'm still talking.

22 Q Please, go ahead.

23 A I'm still talking. Because
24 we're talking -- because as I said
25 customs and practices in the music

1 KOHN

2 industry and that applies across the
3 board.

4 Q The music industry?

5 A Yeah. And it includes -- the
6 music industry includes the record
7 companies, PROs, music publishing
8 companies and music production
9 libraries or production music
10 libraries.

11 Q We're talking about sync
12 licenses now, aren't we, blanket sync
13 licenses?

14 A No, we're looking at -- we're
15 looking at blanket revenue.

16 Q No.

17 A Yes, we are. Oh, yes, we
18 are.

19 Q Yes, we are?

20 A Yes, we are. We're looking
21 at blanket -- a blanket license is a
22 form of license where you -- one of
23 your experts would like to use the word
24 access. So you have -- we're going to
25 reduce your transaction costs, you

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KOHN

know, read US versus ASCAP and BMI.
You know a 1979 Supreme Court case, the
reason why they don't violate the
antitrust laws, music publishing
companies, is because they're reducing
the transaction cost of their
customers. That's what a blanket does.
A -- it's something that's issued in a
blanket form that you can go ahead and
use what's here. All right? And
whenever money is brought in on a
blanket basis whether it's from a PRO
issuing for performance licenses,
whether it's a blanket for
synchronization licenses, whether it's
from a record company who's got
breakage, whether it's from black box
money that's overseas from music
publishing companies, you always
allocate it to the best of your ability
on a fair and reasonable basis which is
always based upon usage.

If you don't base it upon
usage you're going to have some songs

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KOHN

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that have been performed a lot or

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sync'd a lot or used a lot get the same

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amount of money as songs who don't get

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used at all. That is unfair and

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unreasonable. It may be practical

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because it makes your job easier, but

8

it's unfair and it's unreasonable.

9

That's the music industry. Everyone

10

does that. And if you don't do it --

11

if you don't do it, you're being unfair

12

and you're being unreasonable.

13

Q So -- oh, you're still

14

talking?

15

A Yeah.

16

So I have those examples in

17

this report on 76. I say it's a common

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practice for record companies to

19

allocate blanket income on the basis of

20

the most practical means available.

21

For example, sometimes a record label

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must pay royalties on what is called

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breakage income. That is, they might

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have received an advance from an

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organization that does streaming from,

KOHN

1 let's say, ten years ago, a company --
2 Cue Tracks, it's a company that paid
3 millions of dollars to the record
4 companies, and they may have gone out
5 of business before they even went
6 online. All right? So now a record
7 company is at advance of let's say 10
8 or \$20 million, and how do they
9 distribute that money to the artist?
10 They have no reports whatsoever. What
11 they do is they look at other streaming
12 companies, look at the reports that
13 they do have, do an extrapolation and
14 allocate the money based upon usage.
15 They do not allocate the money counting
16 the number of recordings that they have
17 in their catalog and giving everyone
18 the same amount. Okay?

20 So that's the record
21 industry. And I say here -- and you
22 were asking who did I talk to. Well,
23 in that particular instance when I was
24 in my company at Royalty Share I sat in
25 policy discussions at Sony Music, which

1 KOHN

2 is a sister company to Sony ATV, and
3 that's how they do it. The Sony
4 corporation does it that way. That's
5 the way it's supposed to be done.

6 Now, black box monies is
7 monies overseas that music publishers
8 receive that do not come accompanied by
9 usage reports because it's money that
10 was unallocated to anyone specifically.
11 The music publisher gets it and an
12 honest music publisher will distribute
13 that monies -- its portions to the
14 other publishers, sub-publisher,
15 original publishers or others,
16 copublishers and to songwriters on a
17 fair and reasonable basis. And that's
18 going to be based upon some projected
19 usage or if they have the report it
20 will be actual usage. And that's the
21 way it's done.

22 Nobody that I've ever heard
23 of, except in the past day I heard of
24 First Com, your last -- Mr. Katz said
25 that he acquired a company when he was

1 KOHN

2 at Zamba that did it that way. I was
3 surprised to hear that. A small
4 production music library did it that
5 way.

6 And then you have your own
7 witness, Adam Taylor, he runs a
8 production music library; and he does
9 it the right way. He basis it on
10 usage -- usage reports. Now, all of
11 your experts went to great lengths to
12 say that I said in my report that it
13 has to be done on actual usage. I
14 suspect that that someone may have put
15 in their heads that I said actual
16 usage. But I didn't say that it had to
17 be done in actual usage, BMI and ASCAP
18 don't do it on actual usage all the
19 time. They do get numbers based upon
20 electronic usage reports that reflect
21 accurate usage pretty well.

22 But when your experts set up
23 strawman that says that nobody can do
24 it in actual usage, that's simply not
25 what I said in my report. It's a

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strawman. I said it's based upon
usage. Adam Taylor agrees it's based
upon usage. I think anyone who would
do it on the basis of the number of
songs -- if ASCAP did it they'd be out
of business the next day. If record
companies did it, they'd be sued by
their recording artists. And if a
production music company did it to
their songwriters, they would be sued
by their -- sued by their songwriters.
And that's what this case is about.

Q Okay. Let me know when
you're done.

A I'm done.

Q Okay.
You talked about custom and
practice, but the custom and practice
now you're talking about is the music
industry generally and not related to
sync licensing by production music
libraries; is that right?

MR. MARDEROSIAN: I'm going
to object.

1 Kohn

2 Mischaracterizes the
3 testimony. Argumentative.

4 A I am using it as sync
5 licenses for a production music
6 library. I mentioned Adam Taylor
7 two -- how many times did I mention him
8 in the past ten minutes? He runs a
9 production music library, has admitted
10 that his blanket sync licenses, when he
11 gets the income -- when he gets his
12 income he also gets usage reports to
13 find out what songs have been sync'd.
14 And he uses some message -- some
15 methodology based upon his usage. He
16 wasn't specific in his report, but I
17 was very happy to hear that he's doing
18 it in some. I don't know for sure. I
19 haven't seen his calculations, but if
20 it's based upon usage, it's likely to
21 be more fair and more reasonable than
22 basing it upon the number of songs in
23 the catalog, which virtually nobody
24 does except your client.

25 Q You said virtually nobody

1 KOHN

2 does. What -- who have you talked to?

3 A I don't have to talk to
4 everybody in the industry.

5 Q You don't have to talk to
6 anybody it appears.

7 A I --

8 MR. MARDEROSIAN: Folks,
9 you're arguing with each other.

10 Q You haven't identified a
11 single --

12 COURT REPORTER: Excuse me.

13 A I have -- I don't have to --

14 Q You haven't identified a
15 single production music library that
16 you've contacted, spoke to, or found
17 out how they do it; is that right?

18 A I sat in a deposition -- I'm
19 sorry -- in a deposition yesterday. If
20 you don't remember, you can get the
21 transcript and read it. Right?

22 Q I remember it well.

23 A His report says usage. He
24 was asked specifically whether he
25 thought that was fair. Now, this is a

1 Kohn

2 guy who sat on the board of APM, the
3 production music library that your
4 other expert is the CEO of.

5 Q Um-hum.

6 A He circled the wagon saying
7 of course it's okay to do this because
8 I had a company like that myself that
9 that did it.

10 Q You didn't answer my
11 question.

12 A I did answer your question.
13 I just told you -- I just told you a
14 production music library out of the
15 voice of your own experts, two of them,
16 okay, are saying that they -- that's
17 the way they do it.

18 Q I just want to make sure. So
19 your testimony about custom and
20 practice is now based upon what Paul
21 Katz testified to yesterday and what
22 Adam Taylor has in his report; is that
23 it?

24 A That's not what I'm
25 testifying. It's not what I said.

1 Kohn

2 Q I don't know what you're
3 saying.

4 MR. MARDEROSIAN: Hold on.
5 Stop.

6 He's answered the question.
7 You're now arguing with him. Stop
8 arguing with him, Don.

9 Let's go to the next topic.
10 You've got his testimony on the
11 subject.

12 MR. ZAKARIN: He hasn't
13 identified a single production
14 music --

15 MR. MARDEROSIAN: Incorrect.
16 You haven't listened to what
17 he said.

18 MR. ZAKARIN: I was --

19 MR. MARDEROSIAN: You -- save
20 it for trial, Don.

21 MR. ZAKARIN: No.

22 MR. MARDEROSIAN: Save it for
23 trial and let's see --

24 MR. ZAKARIN: That's not how
25 it goes.

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KOHN

MR. MARDEROSIAN: -- if the jury accepts your argument on this.

MR. ZAKARIN: That's not how it goes, Mick. My questions get answered, or else I don't leave them.

MR. MARDEROSIAN: His question -- he did answer your question, you're now just arguing it.

A You just don't like the answer to the question.

Q Well, you -- if you gave an answer, I might like it.

I asked you --

COURT REPORTER: Excuse me. Gentlemen, please.

MR. MARDEROSIAN: Hold on, Don. Give her -- give her a moment.

COURT REPORTER: I just need you to speak one at a time, please.

1 KOHN

2 MR. ZAKARIN: We'll try.

3 Q You've talked about custom
4 and practice and my question was very
5 simple. What production music
6 libraries have you ascertained allocate
7 blanket license income on any kind of a
8 usage basis? We know APM does it on a
9 reported usage basis. What else? What
10 other production music library
11 allocates it, however they allocate it?
12 Do you have any information? Any
13 information?

14 A I suspect that every other
15 one does it except your client today
16 and maybe First Com if it still exists.

17 Q I didn't ask what you
18 suspect. I asked what you know, facts.

19 A I know the customs and
20 practices of the music industry. I
21 can't tell you over 20 years of being
22 in the industry and discussing with
23 people who know what they're -- I may
24 have discussed it with Adam Taylor, who
25 knows, because we did discuss his

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KOHN

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business when I met with him five, six

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years ago, whenever it was. But I

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learned this over a period of time.

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And it is not fair -- my opinion is

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that it's not fair or reasonable to

7

base it upon the number of songs.

8

Nobody apparently but your client does

9

it. You have not and your experts have

10

not pointed to anyone who does it that

11

way.

12

Q You're the one who's talking

13

about custom and practice.

14

A Yes.

15

Q I'm not. So I want to know

16

what the custom and practice is of

17

production music libraries allocating

18

it. You have a statement --

19

A Production.

20

Q -- the basis for the

21

statement -- you've talked about the

22

ASCAP and BMI. You've talked about

23

record companies. You've talked about

24

black box.

25

MR. MARDEROSIAN: He's talked

1 KOHN

2 about your own experts, Don.

3 Q What you haven't talked
4 about -- we have Adam Taylor who says
5 that they do it on a -- on a reported
6 usage basis and that's fine. And Adam
7 Taylor says what he says. And it's in
8 his report.

9 I'm asking you what
10 production music libraries do you
11 know -- do you know how other
12 production music libraries allocate
13 blanket license income?

14 A Yes, they all do it.

15 Q Who?

16 A They all do it except
17 Extreme. APM is one example of it.
18 And over the years --

19 Q Give me another examples.

20 A Over the years -- I can't
21 imagine -- my opinion is it's not fair
22 or reasonable.

23 Q I didn't ask that. You can
24 have that opinion.

25 MR. MARDEROSIAN: He told you

1 KOHN

2 Sony Music, Don. You're leaving
3 that out.

4 MR. ZAKARIN: Sony Music is
5 not a production music library.

6 MR. MARDEROSIAN: He told you
7 how they handle the publishing in
8 regard to those uses.

9 MR. ZAKARIN: Black Box. I
10 understand black box. That's not
11 the question.

12 A Yes. The music industry
13 allocates money that's presented on a
14 blanket basis whether it's the leftover
15 advance, whether it's black box money,
16 whether it's income. There's no one
17 who's going to -- there's no one except
18 maybe one of your witnesses yesterday
19 who suggested that that might even be
20 close to being fair. It's not.

21 I don't have to talk to every
22 production music library in the world.

23 Q Do you have to talk to any?

24 A I don't even know all of the
25 ones that do it on a blanket basis,

1 KOHN

2 okay. Has your expert witnesses
3 reported back as to who other -- anyone
4 other than First Com that does it? You
5 have three -- you have an expert
6 witness who is the CEO of one of the
7 largest production music libraries in
8 the world.

9 Q Yes.

10 A Your client is the CEO of a
11 production music library, one of the
12 largest in the world.

13 Q Yes.

14 A Have either of them suggested
15 that anyone other than Extreme does it
16 this way? What do they say?

17 Q Are you aware of how many
18 production music library --

19 A I didn't see that.

20 Q Are you aware of how many
21 production music libraries there are in
22 the United States?

23 A How many? The number?

24 Q Yeah.

25 A No. It must be a large

1 KOHN

2 number.

3 Q And with the exception of
4 Adam Taylor's testimony in his report
5 about on a reported usage basis, do you
6 know how any of them -- any of these
7 many numbered production music
8 libraries allocate blanket license
9 income? Do you know how any of them do
10 it?

11 A Yes, they do it on a usage
12 basis.

13 Q And what's the basis for your
14 statement that they do it on a usage
15 basis?

16 A Because everybody does it
17 that way in the business except your
18 client.

19 Q So this is just a conclusion.
20 It's not based upon your knowledge of
21 any facts, right?

22 MR. MARDEROSIAN: You're
23 arguing with him. You're arguing
24 with him. He's answered your
25 question.

1 KOHN

2 Q Have you done a survey of any
3 production --

4 A Yeah, I did a survey.

5 Q Of the production music
6 library?

7 COURT REPORTER: Excuse me.
8 Gentlemen, please.

9 MR. MARDEROSIAN: You're just
10 arguing.

11 MR. ZAKARIN: I just want to
12 know the source.

13 A I haven't been -- I haven't
14 been asked to do a survey and nor have
15 any of your experts come forth with
16 anybody else.

17 Q So you haven't done a
18 survey --

19 A Nor has your client.

20 COURT REPORTER: Excuse me.
21 I'm going to need to take a break.

22 MR. ZAKARIN: I know. I'm
23 sorry. I'm asking questions, and
24 he's actually answering on top of
25 my questions.

1 KOHN

2 Q You haven't done a survey,
3 right? I'm not saying you were asked
4 to --

5 A I have not done a
6 questionnaires kind of survey.

7 Q And you haven't done a census
8 or questioned any executives of any
9 production music library about how do
10 they allocate their blanket license
11 income; is that right? Yes or no?

12 A In the -- since the start of
13 this case, no, for sure.

14 Q And you didn't ask them
15 before the start of this case, did you?

16 A I might have.

17 Q But you don't recall whether
18 you did?

19 A I don't recall.

20 Q Okay.

21 A How did I come to this
22 knowledge? I can't remember who I
23 may -- might have talked to in the
24 1990s in researching the book.

25 Q I understand.

1 KOHN

2 BMI and ASCAP to make it a more rapid
3 process, I suppose.

4 Q Do you have any familiarity
5 with the finances of production music
6 libraries?

7 MR. MARDEROSIAN: Objection.
8 Vague. Overbroad.

9 Q You can answer the question.

10 A No, I don't have any -- other
11 than the testimony that I've been able
12 to provide and the expertise that I
13 have about customs and practices. No,
14 I don't have -- when you say finances
15 I'm thinking of balance sheet income
16 statement --

17 Q Yeah.

18 A -- cash flow, things like
19 that.

20 Q Yes.

21 A No.

22 Q We're talking the same
23 language.

24 A Right. No. Nor have I been
25 asked to opine on any of that.

1 KOHN

2 Q I understand.

3 Do you have any understanding
4 how much a usage apportionment approach
5 might cost a production music library
6 to implement?

7 A Depends upon the
8 circumstances. Apparently APM uses
9 usage reports; and they seem to find it
10 not burdensome, otherwise why would
11 they do that.

12 Q You're aware --

13 A Well, they would do it for
14 obligations for -- contractual
15 obligations perhaps.

16 Q You're aware from having read
17 Adam Taylor's report that his view of
18 the reported usage method is that a lot
19 of people whose works are used actually
20 don't get paid?

21 A I don't recall reading that
22 in the report.

23 Q Well, on the reported usage
24 basis -- do you understand what APM's
25 reported usage basis is?

1 KOHN

2 MR. MARDEROSIAN: That's
3 argumentative. Assumes facts not
4 in evidence and mischaracterizes
5 the evidence.

6 MR. ZAKARIN: Except that
7 it's true.

8 A You'll have to --

9 MR. MARDEROSIAN: It's not
10 true.

11 A Well, the number is either
12 going to be 16,000 or it's going to be
13 21,000 or something in between. You
14 know, there's a correct number.

15 Q How many of them -- of those
16 16,000 are Viacom, if you know?

17 A I didn't do that filter.

18 Q Because we didn't add up --
19 and this came from Karen Rodriguez
20 anyway, right?

21 A Yes.

22 Q So we'll skip that.

23 You're aware of the BMI --
24 excuse me, ASCAP consent decrees,
25 aren't you?

1 KOHN

2 A Generally. I haven't read
3 them in years.

4 Q Sadly, I have much more
5 familiarity I think.

6 But you're aware generally
7 that they preclude publishers and
8 writers from granting ASCAP and BMI
9 exclusive public performance rights,
10 aren't you?

11 A So what?

12 Q So what? I didn't ask you so
13 what. I asked you whether you're aware
14 of that?

15 A They -- it doesn't preclude
16 the music publishers from granting it.

17 Q It actually requires that
18 music publishers can't grant exclusive
19 rights to ASCAP and BMI. They have to
20 be --

21 A That's right. That's right.
22 They have to reserve the right. It's a
23 non-exclusive basis so they have to
24 reserve the right to issue direct
25 blanket performance licenses. I saw

1 KOHN

2 that in Barry's report.

3 Q You knew it beforehand,
4 didn't you?

5 A Yes.

6 Q And broadcasters are also
7 fully aware of it, aren't they?

8 A Yes.

9 Q And you're aware, aren't you,
10 that broadcasters -- a number of
11 broadcasters will demand direct
12 performance licenses?

13 A Yes, they will.

14 Q Okay.

15 A When they can get it.

16 Q You can say no, but you can
17 also lose the license if you say no;
18 isn't that right?

19 A That's correct.

20 Q Okay.

21 A Sometimes they need to have
22 the music they need to have and --

23 Q Well, need to have the music
24 they need to have is more frequent with
25 popular music library -- popular music

1 KOHN

2 publishers rather than production music
3 libraries, wouldn't you agree?

4 A I wouldn't necessarily put it
5 that way. But I think the way you've
6 put it is that production music
7 libraries have been more amenable to
8 granting direct public performance
9 licenses than commercial -- what your
10 client called -- other kinds of music
11 publishers, traditional music
12 publishers.

13 Q Traditional music publishers
14 have evergreens and must-haves as
15 opposed to more generic music?

16 A Right. Because -- because
17 production music libraries have this --
18 it's not because the music is any
19 worse.

20 Q No, nobody is saying quality.

21 A But they also have the
22 ability to grant the sound recording at
23 the same time, and that gives them
24 their special advantage.

25 Q But they typically don't have

1 KOHN

2 must-have works or evergreen works.

3 They have genres that are used by
4 broadcasters.

5 A Sure.

6 Q And popular music is just --
7 costs much more and you have much more,
8 if you excuse, me F-U power when you
9 have popular music?

10 A Sure.

11 Q I didn't think that it was
12 controversial.

13 A I don't think so either. But
14 you can't -- you can't jump to the
15 conclusion just because the consent
16 decrees say that publishers can issue
17 direct licenses, that a publisher will
18 issue a direct license and then not
19 allocate the money coming back
20 properly.

21 Q But I'm not dealing with
22 allocation. I'm only dealing with,
23 right now --

24 A But the way, one of your
25 experts had used -- I think two of your

1 KOHN

2 experts had quoted a consent decree in
3 connection with their argue. That it
4 was okay not to use a usage basis in
5 their allocation. Yes, they did. And
6 I thought that was -- that was
7 incorrect.

8 Q I don't think that they say
9 that, but they say what they say. So
10 we don't have to debate it between you
11 and I. I think the simple point that
12 we're just trying to make is that the
13 consent decrees make it impossible for
14 ASCAP and BMI at least to have
15 exclusive licensing rights and
16 performance rights. They can't have it
17 exclusively.

18 A Yes.

19 Q And broadcasters know that
20 and --

21 A We've already been through
22 this, right?

23 Q So we agree.

24 It's not your contention, is
25 it, I just want to make sure, that if a

1

KOHN

2

broadcaster, CNN, I think there are a

3

couple of others, came to Extreme and

4

said we want to license, we want a

5

direct performance license. It's not

6

your contention that Extreme should

7

have rejected that and potentially lost

8

the license, is it?

9

MR. MARDEROSIAN: Objection.

10

Incomplete hypothetical.

11

Calls for speculation.

12

Q Let me rephrase it. Let me

13

rephrase it.

14

A Okay.

15

Q It's not your contention, is

16

it, that if a broadcaster, whether it

17

was CNN or another broadcaster said

18

we're willing to enter into a blanket

19

license with you but only if you grant

20

us also a direct performance right,

21

that Extreme should have simply said

22

no, we won't do it?

23

A If Extreme is not prepared to

24

do the work necessary to comply with

25

its contracts with songwriters to

1 KOHN

2 allocate the income on the blanket
3 basis on a usage basis, then it should
4 reject it.

5 Q Okay. I understand your view
6 on how a blanket should be allocated.
7 So we may disagree, but that's your
8 condition that they can do it but only
9 if they allocate on a usage basis; is
10 that your position?

11 A Yes.

12 Q Okay.

13 And what about on a -- I call
14 it a needle drop. You call it what, a
15 --

16 A I think a needle --

17 Q -- either a source or a
18 direct license?

19 A I was saying that either
20 there's a -- yeah, there's either a
21 blanket agreement or there's discrete
22 agreements. We'll call it --

23 Q I think discrete and source
24 are used, but I think in the industry
25 they primarily call it a needle drop.

1 KOHN

2 Be that as it may, if a
3 broadcaster comes, and it could be CNN,
4 it could be Hearst, it could be
5 anybody, and says I'll license X, Y and
6 Z works from you but you've got to
7 grant me the public performance grant,
8 as well. It's not your contention that
9 they should have, meaning Extreme
10 should have rejected that demand?

11 A Sorry. You're going to have
12 to repeat the question because I didn't
13 follow it.

14 Q I'm talking about a needle
15 drop and discreet license.

16 A Right.

17 Q For individual works.

18 A Right.

19 Q A broadcaster comes and says
20 I want to license X, Y and Z songs for
21 sync usage.

22 A Let's say three -- you said
23 three songs.

24 Q It could be ten songs. It
25 doesn't matter.

1 KOHN

2 A Okay.

3 Q I want to license these ten
4 songs, and I want to grant the public
5 performance rights along with that
6 grant. Okay? It's not your
7 contention, is it, that Extreme should
8 have or was obligated to reject the
9 license request?

10 A It has an obligation to each
11 of the songwriters, as we've discussed,
12 to allocate the income if it's done on
13 a blanket basis.

14 Q We're not talking about a
15 blanket. We're talking about a
16 discreet --

17 A So let's talk about one song.
18 Don't say three songs. Say one song.

19 Q Well, each one gets its own
20 value in the license, in other words
21 I'll license it for 300, this one for
22 400, this one -- whatever I get.

23 A Okay.

24 So it's basically -- it's
25 four or five discreet licenses and one

1 KOHN

2 agreement that covers all five sync
3 licenses?

4 Q There are plenty of those.
5 You've seen that, haven't you?

6 A And a public performance
7 license goes along with each of them.
8 Sure, it's done -- theatrical licenses
9 were done in precisely that way.

10 Q But for television that's
11 what a broadcaster demands and the
12 choice is you either do it or -- a
13 broadcaster does it as well and they
14 come to you with your choices, you
15 either grant the license or test
16 whether they'll go someplace else?

17 A Fair enough, yes.

18 Q You're not suggesting that
19 Extreme was obligated to reject any
20 direct license demands by a
21 broadcaster?

22 A Well, if you're going to --

23 MR. MARDEROSIAN: I'm just
24 going to object again.

25 It's an incomplete

1 Kohn

2 hypothetical and vague.

3 A I'm not going to get -- so,
4 you know, you'll take my answer and
5 take it out of context. Because we
6 just had a colloquy here among several
7 things.

8 So to state the complete
9 hypothetical, and that is, a
10 broadcaster goes to a copyright owner
11 and wants to have a sync license
12 coupled with a direct public
13 performance license for a particular
14 song and recording with that song,
15 right?

16 Q Comes to the production music
17 library, yes.

18 A Right. And let's say there's
19 one or two songwriters who on the back
20 end will be allocated their, let's say
21 it's 50 percent of the license fee.

22 Q Um-hum.

23 A I don't see any issue on the
24 allocation side. We know what the
25 usage is. It's going to be -- the

1 KOHN

2 contract is going to say you're allowed
3 to use it in one episode or ten
4 episodes, or you can use it in as many
5 episodes as you want during the year,
6 you could do whatever basis it is.

7 Q It's not a blanket. It's not
8 a blanket.

9 A Right. It's a discreet
10 license.

11 Q I agree.

12 A Of course they have -- the
13 copyright owner has the right to do
14 that.

15 Q Okay. I just wanted to make
16 sure.

17 Turn again, if you would --
18 first of all, turn to Page 14 of your
19 opinion again, if you would.

20 This is the second to last
21 bullet point on 14. We're referring
22 really to your Exhibit A again, okay?
23 And it says with respect to a fair and
24 reasonable market value for the body of
25 the sync licenses as negotiated by

1 Kohn

2 speaking it will go slower.

3 MR. MARDEROSIAN: If you want
4 to keep asking the types of
5 questions you're asking, it's
6 going to go real slow.

7 Q Okay. That's fine. Middle
8 paragraph of Page 44. As Mr. Emanuel
9 testified, the AETN prefix was used as
10 a means to split Extreme's publisher
11 share of that income with the A&E
12 network. This has no benefit to the
13 songwriters. Indeed, it has the
14 potential to harm it. The potential
15 confusion could cause performance
16 royalties to be misdirected as
17 additional registrations for the same
18 songs could spawn unanticipated errors.

19 Let's work through that
20 statement, Mr. Kohn. You're aware,
21 aren't you, that A&E has a blanket
22 license with BMI?

23 A Yes, we saw that earlier, I
24 think.

25 Q When I showed you TNN but

1

KOHN

2

within that Exhibit I believe is A&E as

3

well?

4

A Right.

5

Q And that was at Allison

6

Smith's deposition, right?

7

A Yes.

8

Q Okay.

9

And you understand, don't

10

you, that under that blanket license

11

the licensees pays a share of its

12

revenues to the PROs regardless of how

13

much or how little it uses works?

14

MR. MARDEROSIAN: Objection.

15

Incomplete hypothetical.

16

Vague and ambiguous.

17

Q You could answer.

18

A That AETN, as the licensee of

19

BMI, right -- is that what you're

20

talking about?

21

Q It's actually A&E is the

22

licensee of BMI.

23

A Okay. That's right.

24

Q Pays a blanket license fee?

25

A Yes.

1 KOHN

2 Q And it's based on a
3 percentage of its revenue, not based
4 upon its usage of works?

5 A That's correct.

6 Q Now, if the licensee also
7 receives back some performance income
8 for the works that it uses, that
9 reduces the effective cost of its
10 blanket license, doesn't it?

11 A If the licensee --

12 MR. MARDEROSIAN: I'm just
13 going to object. It's an
14 incomplete hypothetical. Vague
15 and overbroad.

16 A So repeat the question.

17 Q Sure.

18 If the licensee -- we'll deal
19 with A&E.

20 A That's the broadcasting --

21 Q A&E is the blanket license.
22 If it gets paid back some performance
23 income for the works that it uses,
24 because it has a share of the
25 publisher's share of performance

1 KOHN

2 income, that reduces the effective cost
3 of its blanket license, doesn't it?

4 MR. MARDEROSIAN: That calls
5 for speculation and incomplete
6 hypothetical.

7 A It doesn't reduce the cost of
8 its blanket license. It reduces the
9 cost of its music because it's now
10 getting income.

11 Q It's getting income that it
12 can offset against the fees that it has
13 to pay to BMI?

14 MR. MARDEROSIAN: I'm just
15 going to object. It calls for
16 speculation.

17 A It can use to offset it,
18 yeah; but it doesn't reduce the cost of
19 the blanket license.

20 Q Right. The blanket
21 license -- if it gets -- if it gets --
22 if it pays \$10 on its blanket license
23 and gets \$5 back as its publisher share
24 of performance income, effectively the
25 ad cost of its blanket is \$5?

1 KOHN

2 MR. MARDEROSIAN: Calls for
3 speculation. Incomplete
4 hypothetical.

5 A It's going to find a new
6 source of income. And if you wish to
7 say that it offsets, it gets a new
8 source of income from music, then you
9 wish to say that it offsets its cost of
10 music, sure. It offsets its cost of
11 electricity.

12 Q Okay.

13 A Fine.

14 Q And you'd agree, wouldn't
15 you, logically that A&E has an
16 incentive to use the works in its
17 programs that generate income for it?

18 MR. MARDEROSIAN: Calls for
19 speculation. Incomplete
20 hypothetical.

21 Q You could answer the
22 question.

23 A The A&E network is not in
24 business of being a music license.
25 It's not in the business of generating

1 KOHN

2 money from music. Somebody found a
3 means by which it could reduce its
4 music costs. Right?

5 Q Somebody found a means to --

6 A Somebody found a means of
7 reducing its music costs by doing a
8 deal using its leverage, right? And
9 says, okay, if you give me half of your
10 publisher's share I'll go ahead and get
11 that license and use some of your stuff
12 as opposed to -- some of your music and
13 somebody else's music.

14 Q Correct.

15 A That's the way to put it.
16 It's just simply a logical --

17 Q I agree. It has incentive
18 because it's going to make some money
19 as opposed to just spending money.

20 It's incentivized to use the
21 works on which it makes money, right?

22 A There's --

23 MR. MARDEROSIAN: Objection.

24 Calls for speculation.

25 Incomplete hypothetical.

1 KOHN

2 A If all things being equal,
3 but a lot of music use, as you know, is
4 based upon creative decisions that
5 people make. The A&E network can try
6 to let its producers know that this
7 music will help A&E, but the producer
8 might say screw that, I'd rather use
9 somebody else's music because of
10 creative reasons. So you -- you can't
11 just simply --

12 Q I didn't say that it's a
13 guarantee that it will use it. I said
14 it's incentivized to use music on which
15 it will make money, right?

16 MR. MARDEROSIAN: Calls for
17 speculation.

18 Incomplete hypothetical.

19 A All right. So go ahead.

20 Q So -- and Extreme was giving
21 up part of its publisher's share of
22 performance income in order to
23 hopefully get A&E to use those works;
24 isn't that right?

25 MR. MARDEROSIAN: Calls for

1 KOHN

2 speculation. Incomplete
3 hypothetical.

4 Creates a further motive.

5 Q There's a question
6 outstanding.

7 You agree with me, don't you?

8 A I don't disagree with you.

9 Q I didn't think so.

10 So, in any event, that is a
11 potential benefit to the writers, isn't
12 it, that their works get used because
13 Extreme is, in effect, subsidizing or
14 hopefully in effect sharing by sharing
15 its performance income to subsidize the
16 possible use of their works?

17 MR. MARDEROSIAN: I'm going
18 to object.

19 It assumes a fact not in
20 evidence if they were actually
21 being paid for those uses. And
22 secondly it's an complete
23 hypothetical.

24 A Okay.

25 I -- but I can see that now.

1 KOHN

2 I mean, what I was trying to do is
3 contrast what the CEO is saying with
4 his own COO. Because the COO
5 originally explained that the AETN
6 reference is actually an additional
7 means of linking the songs to the
8 authors for purpose of paying public
9 performance income.

10 Now, I may have read that as
11 saying paying performance -- for public
12 performance income to the songwriters,
13 which I thought was simply nonsense.
14 And then I saw the CEO disagree with
15 that. Because he was explaining it as
16 a means to split Extreme's publisher
17 share with somebody else and attract to
18 account -- to account and track the use
19 of it.

20 Q But you see now what we just
21 walked through. There is, in fact, a
22 benefit to the writers?

23 A Yes.

24 MR. MARDEROSIAN: Hold on,
25 please.

1 KOHN

2 I've seen sheets -- cue sheets reflect
3 inaccurate information. And through a
4 comparison -- I don't know whether I'm
5 talking about Viacom. I have to think
6 about that again. But it doesn't sound
7 like I'm just limiting this to Viacom.

8 Q Let's not limit it to Viacom.

9 A Okay.

10 Q So let's take a step back.

11 You compared the number of
12 TuneSat detections to the number of cue
13 sheets. That's what is reflected here,
14 right?

15 A Yes. It was my understanding
16 there was a couple of thousand cue
17 sheets and there were 16,000
18 detections. And that's the rough look
19 that I was looking at.

20 Q Okay.

21 A If those numbers -- they're
22 not accurate numbers because I didn't
23 count every single one. I had a
24 better -- I had real number with
25 TuneSat and I -- I don't know where I

1 KOHN

2 it was 16,000.

3 Q It was based on the raw
4 TuneSat data, yeah?

5 A Yes.

6 Q And we talked about this
7 earlier, but it's your understanding
8 that there's only one cue sheet for any
9 particular audiovisual program?

10 A Correct.

11 Q Regardless of the number of
12 the broadcasts, right?

13 A That's correct.

14 Q So presumably you took the
15 TuneSat data and filtered out every
16 redundant instance of any particular
17 audiovisual program; is that right?

18 MR. MARDEROSIAN: By
19 redundant you mean rebroadcasts?

20 MR. HWANG: Correct.

21 A My intention was, yes, to
22 filter out any redundant rebroadcasts.
23 The caveat that I mentioned earlier was
24 that I knew it was there, but I didn't
25 know how to filter out if a song that

1 KOHN

2 appeared in a TV program that was
3 broadcast on -- let's say MTV in the
4 United States was broadcast on MTV
5 Germany. That would have been the same
6 sync. I did not filter out the Germany
7 thing. I didn't know how to do that.

8 Q Well --

9 MR. MARDEROSIAN: There might
10 have been a German cue sheet as
11 well for that society.

12 A Yeah, and I don't know. I
13 don't know.

14 Q It's my understanding that
15 your Exhibit B is from Karen Rodriguez,
16 correct?

17 A Yes.

18 Q And that's the number of
19 unique detections she determined exist?

20 A Yes. I understand it was
21 from her.

22 Q And this is further evidence
23 of this conclusion that there weren't a
24 sufficient number of cue sheets filed
25 because the number of unique detections

1 KOHN

2 the first one.

3 Q Okay.

4 A And there was a song that's
5 in there, you know, that is the Rob and
6 Aron song -- an Aron and Rob song back
7 there and The Young Heathens. It's
8 there. I missed it.

9 MR. HWANG: Mark this as
10 Exhibit 10.

11 (Printout from IMDB.com of
12 all 20 episodes from the two
13 seasons of the show Ain't That
14 America, was marked K Exhibit 10,
15 for identification, as of this
16 date.)

17 (Cue sheets corresponding to
18 K Exhibit 10, was marked K Exhibit
19 11, for identification, as of this
20 date.)

21 MR. HWANG: Exhibits K10 and
22 K11.

23 Q Mr. Kohn, the reporter has
24 handed you two separate exhibits,
25 Exhibits 10 and 11.

1 KOHN

2 Exhibit 10 is a printout from
3 IMDB.com of all 20 episodes from the
4 two seasons of the show Ain't That
5 America. And there are eight episodes
6 in Season 1 and there are 12 episodes
7 in Season 2. Eleven is the 20 cue
8 sheets corresponding to each of those
9 episodes.

10 And you can take a look
11 through and confirm that for me.

12 A I accept your representation
13 that these are what you just described.

14 Q Okay.

15 A Without going through every
16 one of them.

17 Q So your statement that Viacom
18 has not produced a commensurate number
19 of cue sheets for the episodes aired
20 with respect to the show Ain't That
21 America is also incorrect, right?

22 A Apparently these are two
23 examples. I was given two examples and
24 apparently -- if your representation is
25 correct that these represent every

1 KOHN

2 single episode then that would be an
3 incorrect statement.

4 Q Okay.

5 Who gave these facts to you?

6 A I asked for two examples of
7 missing cue sheets that would be
8 familiar to people who are -- you know,
9 there's a lot of songs -- a lot of TV
10 shows you can pick. I'm familiar with
11 Jersey Shore. I'm familiar with Ain't
12 That America. I recognize those. And
13 they said these are two and they
14 suggested that those are the two
15 examples where cue sheets were missing.

16 Q They being -- they being the
17 plaintiffs?

18 A Well, Mick, yes.

19 Q And these are the only two
20 examples within this category under
21 Subsection B of Viacom's purported
22 failure to submit cue sheets to BMI,
23 correct?

24 A I'm sorry, the only what?

25 Q The two examples that you

1 KOHN

2 identity of instances where Viacom
3 failed to submit a sufficient number of
4 cue sheets to BMI or Jersey Shore and
5 Ain't That America, right, in your
6 entire report?

7 A I think those are the two
8 examples that I provided and they may
9 be the only ones; but, yes.

10 Q And they're both incorrect,
11 right?

12 A Looks like it.

13 Q Do you know if the
14 Marderosians received their writer
15 share of public performance royalties
16 with respect to each of the 15 episodes
17 of Jersey Shore identified in your
18 Footnote 13?

19 A Well, I have all of the
20 statements and if I went back and
21 looked I would be able to tell you.

22 Q Did you look?

23 A I was focused more on the
24 detections on TuneSat, so I don't
25 remember looking at the BMI statements.

1 KOHN

2 Or did I? I don't remember right now.

3 I think I focused on the TuneSat

4 detections, that there were lots --

5 they were missing cue sheets and there

6 were lots of performances. But I may

7 have missed going to the BMI statements

8 to check. They're very detailed and,

9 as you know, looking for these are like

10 a needle in a haystack. With

11 everything else that I was doing I

12 wasn't going to go into that level of

13 detail on this.

14 Q So you didn't look at the BMI

15 statements to confirm that -- whether

16 or not --

17 A No.

18 Q Hold on.

19 Whether or not the

20 Marderosians received the writer share

21 of public performance royalties with

22 respect to each of the 15 episodes

23 identified for Jersey Shore in your

24 Footnote 13, correct?

25 A Yes. I don't remember doing

1 Kohn

2 that.

3 Q With respect to Ain't That
4 America, is it the same, you didn't go
5 through the BMI statements for Robert
6 and Aron Marderosian to confirm whether
7 or not they received any public
8 performance income with respect to the
9 20 episodes of that show?

10 A I didn't because I was
11 operating under the assumption. I
12 didn't see the cue sheets. I saw the
13 detections. I didn't go look at BMI
14 and I should have.

15 Q And if, in fact, the
16 Marderosians received their writer
17 share of public performance royalties
18 with respect to each of these 20
19 episodes of Ain't That America and the
20 15 episodes you identified for Jersey
21 Shore, that would necessarily mean that
22 Viacom had submitted cue sheets for
23 each of those episodes to BMI, right?

24 A If, in fact, they got
25 performance royalties in their

1 KOHN

2 statements on these shows -- I don't
3 know whether they have or not because I
4 haven't looked at the statements. They
5 might not have. I don't really know.

6 You represent to me that
7 you've looked at the statements and you
8 found monies paid to them for --
9 throughout this entire period.

10 Q I haven't represented that to
11 you, no.

12 MR. MARDEROSIAN: He said --
13 I don't remember him saying that.

14 A I'm asking him if he has,
15 so -- but I haven't seen it, so I can't
16 tell you that they have been paid
17 because I don't remember looking at the
18 BMI statements for that purpose. I
19 looked at them for other purposes but I
20 don't recall doing that.

21 I kind of may have jumped to
22 the conclusion that since I couldn't
23 find what you just showed me out of
24 thousands of BMI statements that were
25 clogging up my hard disk, that there

1 KOHN

2 MR. ZAKARIN: Exhibit 11
3 should have been marked as Exhibit
4 11.

5 Well, Jersey Shore is K9.

6 MR. HWANG: You can stop
7 testifying.

8 MR. MARDEROSIAN: Let me get
9 the exhibit together, nine now.

10 A It's possible that a
11 search -- I have to go look at the
12 documents to see whether I searched. I
13 could have searched for Bayhem and it
14 didn't show up. Maybe that's why it
15 didn't come up.

16 MR. MARDEROSIAN: Okay.
17 This is -- this is nine here.

18 A If I did a search for Bayhem
19 it wouldn't have come up if it only
20 says Extreme. So maybe that's why I
21 thought they were missing.

22 Q But regardless we've
23 established that the statements that a
24 sufficient number of cue sheets for
25 these episodes were not submitted to

1 Kohn

2 BMI is incorrect, correct?

3 A That -- that --

4 Q It's incorrect, right? That
5 statement is incorrect?

6 MR. MARDEROSIAN: I'm going
7 to object. That's argumentative.

8 A Well, what I'm saying is that
9 there are --

10 MR. MARDEROSIAN: It lacks
11 foundation.

12 A It appears to me that there
13 are cue sheets for those songs.

14 Q Okay.

15 A And what I'm saying is
16 that -- in my own defense that I
17 probably did a search on Bayhem looking
18 for Bayhem. And the -- a lot of these
19 things -- some of them said Bayhem but
20 a lot of them said Extreme. And I -- I
21 didn't think that the publisher on
22 these would be Extreme, I thought it
23 would be Bayhem.

24 Q But with respect to those
25 songs you saw that --

1 KOHN

2 A You don't have to say it
3 again.

4 Q -- that the Marderosians were
5 properly attributed as to composers,
6 right?

7 A Yes. Correct.

8 Q Other than Jersey Shore and
9 Ain't That America, what examples of
10 Viacom shows are you aware of in which
11 Viacom has failed to submit the proper
12 number of cue sheets to BMI?

13 A I can't give you specific
14 other ones that I know of. I don't
15 remember any now.

16 Q Okay.

17 So the answer is you're not
18 aware of any other than Jersey Shore
19 and Ain't That America?

20 A Right now. I don't think I
21 have any other examples. I was looking
22 for two examples and these were the
23 only two. I don't.

24 Q At the time you submitted
25 this report you weren't aware of any

1 KOHN

2 other examples other than Jersey Shore
3 and Ain't That America in which Viacom
4 had supposedly failed to submit a
5 proper number of cue sheets, right?

6 A Right.

7 Q And sitting here today you
8 are not aware of any other shows other
9 than Jersey Shore and -- withdraw that.

10 Sitting here today you're not
11 aware of any Viacom shows in which
12 Viacom didn't submit a proper number of
13 cue sheets to BMI; is that an accurate
14 statement?

15 A Yes.

16 MR. MARDEROSIAN: I'm going
17 to object. It's vague.

18 A I can't parse it down. No.
19 The answer is no, I am not aware of any
20 sitting here today.

21 Q So the session starting on
22 Page 51 says, Viacom's failure to file
23 cue sheets. It goes on for three pages
24 to Page 53.

25 You're not aware of any basis

1 KOHN

2 upon who's manipulating the data and
3 for what purpose.

4 Q Let me ask you this question:
5 Viewed in isolation, would these four
6 cue sheets to you be an indication of
7 bad faith on the part of Viacom in its
8 submission of cue sheets to BMI?

9 MR. MARDEROSIAN: That's the
10 same question. Asked and
11 answered.

12 I'm going to object. It
13 calls for a legal opinion and
14 conclusion.

15 A I've answered that question.

16 Q No, you answered a very
17 different question that you asked
18 yourself.

19 I'm asking you this narrow
20 question. Viewed in isolation, would
21 the submission of these four cue
22 sheets, out of the hundreds that Viacom
23 submitted to BMI, be an indicator to
24 you in your expert opinion of Viacom's
25 bad faith in its submission of cue

1 Kohn

2 sheets to BMI?

3 MR. MARDEROSIAN: Object.

4 It calls for a legal opinion
5 and conclusion.

6 A Again, if you wanted to set
7 up a hypothetical where a composer's
8 name is incorrect on a cue sheet out of
9 thousands of cue sheets, and that's the
10 only thing -- let's say it's Warner
11 Brothers Pictures, out of thousands of
12 cue sheets they submitted to BMI -- or
13 Warners Brother's Television, out of
14 thousands of cue sheets they submitted
15 to BMI and they had one error that they
16 forgot to put a composer's name in or
17 they either themselves had changed the
18 name of the composer to something like
19 Mix Tape or used somebody else's
20 metadata, in total isolation, in that
21 hypothetical, you could say it sounded
22 like something that would not
23 necessarily bring about a accusation of
24 bad faith.

25 Q Okay.

1 Kohn

2 A That's a hypothetical that
3 you can ask. I'm not going to be
4 taking -- using Viacom -- using what
5 you were trying to do in the context of
6 everything else that's going on here.

7 Q I'm going to ask you -- I'm
8 going to ask you one more time. Okay?

9 These four cue sheets viewed
10 in isolation out of the hundreds of cue
11 sheets that Viacom submitted to BMI
12 listing one or more of the songs at
13 issue in this case, would you take
14 that -- do you take that as an
15 indicator of Viacom's bad faith in its
16 cue sheet submission practices?

17 MR. MARDEROSIAN: I'm going
18 to object. It calls for a legal
19 opinion and conclusion.

20 Q This is the last time I'm
21 going to ask this question and if you
22 refuse to answer it will be noted.

23 A I've already answered the
24 question.

25 Q No, you gave me a totally

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STATE OF _____)
) : ss
COUNTY OF _____)

I, ROBERT H. KOHN, the witness
herein, having read the foregoing
testimony of the pages of this deposition,
do hereby certify it to be a true and
correct transcript, subject to the
corrections, if any, shown on the attached
page.

ROBERT H. KOHN

Sworn and subscribed to before me,
this _____ day of _____, 2018.

Notary Public

C E R T I F I C A T I O N

STATE OF NEW YORK)

) ss.:

COUNTY OF NEW YORK)

I, JUDITH CASTORE, Shorthand Reporter
and Notary Public within and for the State
of New York, do hereby certify:

That ROBERT H. KOHN, the witness
whose deposition is hereinbefore set
forth, was duly sworn by me and that this
transcript of such examination is a true
record of the testimony given by such
witness.

I further certify that I am not
related to any of the parties to this
action by blood or marriage and that I am
in no way interested in the outcome of
this matter.

IN WITNESS WHEREOF, I have hereunto
set my hand this 8th day of November,
2018.



JUDITH CASTORE

Kohn Deposition Volume II

ROBERT H. KOHN - VOLUME II
TWELVE SIXTY vs EXTREME MUSIC LIBRARY

November 02, 2018

1

1
2 UNITED STATES DISTRICT COURT
3 FOR THE SOUTHERN DISTRICT OF NEW YORK
-----X

4 TWELVE SIXTY LLC, ARON MARDEROSIAN,
5 and ROBERT MARDEROSIAN,

6 Plaintiffs,

7 vs.

Civil Action No.
1:17-CV-01479-PAC

8 EXTREME MUSIC LIBRARY LIMITED, a
9 division of Sony/ATV Music Publishing;
10 EXTREME MUSIC LIMITED; VIACOM
INTERNATIONAL INC., NEW CREATIVE
MIX INC., HYPE PRODUCTION MUSIC,

11 Defendants.

12 -----X

13
14
15 VOLUME II

16 CONTINUED DEPOSITION OF

17 ROBERT H. KOHN

18 New York, New York

19 Friday, November 2, 2018
20
21
22
23

24 Reported by:
25 JOAN WARNOCK
JOB NO. J3015335A

ROBERT H. KOHN - VOLUME II
TWELVE SIXTY vs EXTREME MUSIC LIBRARY

November 02, 2018

2

November 2, 2018

9:10 a.m.

VOLUME II - Continued deposition of
ROBERT H. KOHN, held at the offices of
Pryor Cashman LLP, 7 Times Square,
New York, New York, pursuant to Notice,
before Joan Warnock, a Notary Public of
the State of New York.



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November 02, 2018

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November 02, 2018

4

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ALSO PRESENT:

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AMERICA

BARRY MASSARSKY

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1 R. Kohn
2 entitled to. So the statement that you're
3 making that Viacom doesn't owe any money,
4 doesn't owe anything that would generate
5 gross receipts under the 2011 agreement,
6 suggests to me that you think you have a
7 direct performance license.

8 Q. Let me turn your attention to
9 Page 84 of the report. Page 84 of the
10 report.

11 A. Go ahead.

12 Q. You state that Viacom received,
13 quote, a direct public performance license
14 for that music in circumvention of BMI's
15 collection and distribution of writer's share
16 performance fees to Aron and Robert's music,
17 a clear violation of the benefit of their
18 bargain with Viacom. Do you see that?

19 A. That was my conclusion. That is my
20 opinion based upon what I said earlier just a
21 few moments ago, and that is reflected in
22 this report.

23 Q. How did Viacom circumvent BMI's
24 collection and distribution of writer's share
25 performance fees to Robert and Aron?

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1 R. Kohn

2 A. By basically granting itself a
3 direct public performance license.

4 Q. And thereby not feeling obligated
5 or not submitting cue sheets to BMI?

6 A. It doesn't matter. We don't even
7 have to get to cue sheets. If Viacom thinks
8 it's granted itself a direct public
9 performance license, then it has no
10 obligation to BMI to submit cue sheets on any
11 of that.

12 Q. And yesterday we established that
13 you can't identify a single example in which
14 Viacom didn't submit a cue sheet for a
15 program that aired on a Viacom network;
16 correct?

17 MR. MARDEROSIAN: I'm going to
18 object. It calls for speculation and
19 incomplete hypothetical.

20 A. As I just said, Viacom has an
21 obligation to submit cue sheets to BMI for
22 programs. We just read it in the contract.
23 We just read it, right, in the A&E contract.
24 We haven't seen the Viacom agreement with
25 BMI. We can read it in that to actually see

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1 R. Kohn
2 what the obligation that Viacom had. But as
3 a practical matter, I haven't seen any of
4 these -- just because it's in a cue sheet
5 doesn't mean you didn't have a direct
6 performance license, because as a practical
7 matter, you generate a cue sheet of all of
8 the musical works that are in an episode in a
9 program, as I explained.

10 Q. So if a cue sheet is submitted, and
11 there's a direct public performance license,
12 and BMI royalties are paid out to the
13 writers, what is the harm in having a direct
14 public performance license, if any?

15 A. Well, think of all the -- well,
16 there are lots of -- direct public
17 performance licenses were not only issued to
18 Viacom. They were issued to all of the major
19 networks.

20 Q. Let's stick to Viacom.

21 A. No.

22 Q. Because that's what I'm asking you
23 about.

24 A. No. No. You asked me a broader
25 question.

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1 R. Kohn

2 Q. No, that's not what I asked you. I
3 referred you to 84 of your report in which
4 you say Viacom improperly received a direct
5 public performance license, quote, in
6 circumvention of BMI's collection and
7 distribution of writer's share performance
8 fees to Aron and Robert's music. Do you see
9 that?

10 MR. MARDEROSIAN: Mr. Hwang, you're
11 arguing with the witness.

12 MR. HWANG: I'm trying to speed
13 this up for your sake.

14 MR. MARDEROSIAN: Well, I
15 appreciate it, but you have to ask
16 better questions so that we can move
17 this along. He's trying to answer your
18 questions.

19 A. It could explain -- just because
20 BMI received a cue sheet with information on
21 it regarding one of the plaintiff's songs
22 doesn't mean they actually paid the public
23 performance royalty. If they have
24 information from some source, whether it's
25 Extreme or Viacom, right, that there was a

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1 R. Kohn
2 direct public performance license, BMI would
3 not pay. And that might explain why they're
4 not getting paid from BMI what they think
5 they should be paid.

6 Q. Are you aware of any such instance
7 in which this purported direct public
8 performance license to Viacom resulted in a
9 nonpayment of the writer's share of public
10 performance fees to Aron and Robert?

11 MR. MARDEROSIAN: Calls for
12 speculation. Incomplete hypothetical.

13 A. I go back to the extract that you
14 provided to us. What explains the fact that
15 there was Bayham receiving all of this and
16 the writers not receiving it.

17 Q. Okay. Other than that, is there
18 any other instance in which you're aware that
19 the purported direct public performance
20 license to Viacom result in a nonpayment of
21 public performance fees to Aron and Robert?

22 A. When you --

23 MR. MARDEROSIAN: Objection. Calls
24 for speculation. Incomplete
25 hypothetical.

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1 R. Kohn

2 Q. I'm just asking you to identify a
3 single instance, if you can.

4 A. It was a breach of contract to give
5 yourself a direct public performance license,
6 which is what you've been saying during this
7 litigation.

8 Q. Thank you, Judge Kohn.

9 A. That you have --

10 Q. Thank you, Judge Kohn.

11 A. I'm not --

12 Q. I'm asking you a factual question.
13 Are you aware of a single instance in which
14 this purported direct public performance
15 license to Viacom resulted in a nonpayment of
16 public performance royalties to Aron and
17 Robert?

18 MR. MARDEROSIAN: Objection. It
19 calls for speculation. Incomplete
20 hypothetical.

21 A. How can I trace something that's
22 not in a BMI statement, okay. It won't be in
23 a -- nonpayment means not in BMI's statement.
24 How can I look at a BMI statement to the
25 plaintiffs and determine how a payment wasn't

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1 R. Kohn

2 made? What I need to do is go back and look
3 at the TuneSat data which will show me all of
4 the broadcasts for public performances of all
5 those audiovisual works. That would allow me
6 to do that. That was denied to me, okay, so
7 I could not do that.

8 Q. So you're not aware sitting here
9 today of any such instance?

10 MR. MARDEROSIAN: Same objection.
11 It calls for speculation. Incomplete
12 hypothetical.

13 A. How am I going to be aware of an
14 instance of something that I don't have the
15 information to even determine? I can't match
16 a nonpayment to something that I don't have
17 the information on.

18 Q. So you're not aware of any such
19 instance?

20 A. The only way I would be aware of it
21 is to be aware of the actual performances.
22 You're asking me to have watched television
23 full-time all of Viacom networks since 2010.
24 That would be the only way to do it, for me
25 to let you know of a particular instance

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1 R. Kohn
2 without having the TuneSat data.

3 Q. So you're not aware of a single
4 instance sitting here today?

5 A. That's correct. But I suggest that
6 Extreme is aware of it because it has the
7 data.

8 Q. And you speculated that Viacom or
9 Extreme may have told BMI that Viacom has a
10 direct public performance license and
11 therefore BMI doesn't need to pay the
12 writer's share of public performance
13 royalties?

14 A. That's not my testimony. I did not
15 say that.

16 Q. You said that might have happened,
17 right, in that case that BMI wouldn't pay the
18 writer's share. Wasn't that your testimony?

19 A. I didn't speculate on anything. I
20 said that if BMI had received information
21 that it could put into its systems, I mean
22 this is what I would say now, with respect to
23 a particular set of programs and a particular
24 set of musical works, or I should say a
25 network that produces programs under their

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1 R. Kohn

2 agreement, then they wouldn't pay.

3 Q. Are you aware of any such
4 communications?

5 A. No.

6 Q. Okay. If --

7 A. Let me just take that back. I
8 remember seeing in the file several letters
9 that Extreme -- I believe that Extreme wrote
10 to a performance rights society, it might
11 have been BMI, I'm just doing this from
12 memory, that let BMI know that certain
13 catalogs of their works were subject to a
14 direct performance license. I don't know if
15 it was the Viacom network. But I did see
16 that in the file.

17 Q. Other than that, you're not aware
18 of any such communications?

19 A. Well, there might have been others
20 that I haven't seen.

21 Q. So you're not aware of any such
22 communications?

23 A. I'm not aware. I'm not aware of --
24 none of those potential communications have
25 been brought to my attention.

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1 R. Kohn

2 Q. Okay. If Viacom had a direct
3 public performance license, they also
4 wouldn't have received the publisher's share
5 of public performance royalties for uses of
6 the songs at issue on Viacom programming;
7 isn't that right?

8 A. BMI would have received the
9 publisher's share?

10 Q. If Viacom had a direct public
11 performance license --

12 A. Oh. Okay. Viacom.

13 Q. Viacom also wouldn't have received
14 any publisher's share of performance income
15 for programming on its network?

16 A. That's correct.

17 Q. Are you aware of any instance in
18 which Viacom didn't receive the publisher's
19 share of public performance income as a
20 result of this purported direct public
21 performance license that it received from
22 Extreme?

23 A. I have not been provided with any
24 information as to what Viacom -- well, except
25 for the extract, I'm not sure whether that

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1 R. Kohn
2 was Viacom or not now, what's in there. I
3 have not received -- other than the extract
4 that I have seen, no, I have not seen that.

5 Q. The fundamental predicate to what I
6 just asked you is that Viacom as a
7 copublisher is entitled to receive
8 publisher's share of public performance
9 income from BMI; correct?

10 A. Yes.

11 Q. Including --

12 MR. MARDEROSIAN: Well, actually,
13 in reality, the evidence --

14 MR. HWANG: Just stop.

15 MR. MARDEROSIAN: -- in the case is
16 that --

17 MR. HWANG: Just stop testifying.

18 MR. MARDEROSIAN: -- Extreme pays
19 Viacom. BMI does not pay Viacom. So
20 your question is not consistent with the
21 evidence. It misstates the evidence.
22 It's an incomplete hypothetical. It
23 comes from Extreme. They administer,
24 they collect everything. Your own
25 30(b) (6) witness Anita Chinkes said

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2 that.

3 Q. And that includes uses of the songs
4 at issue on Viacom programming; right? In
5 those cases Viacom would receive publisher's
6 share -- would be entitled to receive
7 publisher's share of public performance
8 royalties from BMI; correct?

9 MR. MARDEROSIAN: I'm going to
10 object. That's a misstatement of the
11 evidence. Incomplete hypothetical.

12 A. Yes.

13 Q. And the only way to get paid that
14 publisher's share is by filing cue sheets;
15 right?

16 A. Yes. Well -- yeah.

17 Q. That's the same way that the
18 Marderosians get paid their writer's share;
19 right?

20 A. Yes.

21 Q. And the more uses the more
22 performance royalties the Marderosians
23 receive, and the more performance royalties
24 Viacom receives; right?

25 A. Say that again. I'm sorry.

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2 Q. The more uses that are generated of
3 the songs at issue on Viacom programming, the
4 more performance royalties the Marderosians
5 receive, and the more performance royalties
6 Viacom receives. Is that accurate?

7 A. All else being equal, in other
8 words, if cue sheets were filed, if they were
9 accurate, etc., yes.

10 Q. So their interests are aligned in
11 that regard, aren't they?

12 MR. MARDEROSIAN: Should be.

13 A. And only in that regard, because
14 their interests are -- remember, Viacom is
15 getting a benefit from the direct performance
16 license by paying BMI less, okay. BMI is
17 getting paid less from Viacom by the fact
18 that -- and any network gets paid less by --
19 that's the reason why they get direct
20 performance licenses is they can lower the
21 amount that they pay as part of those
22 negotiations. They pay BMI less money. So
23 songwriters across the United States are
24 getting less money because you granted
25 yourself a direct performance license that

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2 Isn't that what your testimony was a few
3 minutes ago?

4 A. There was -- on that list there was
5 -- it was very substantial. I don't know
6 whether it was performance, but I -- was it
7 performance or sync?

8 Q. I think you testified it was
9 performance.

10 A. I said 34,000.

11 Q. Okay. So that was reported and
12 identified in a document produced by Extreme
13 in this case; correct?

14 A. Right. But the point --

15 Q. No, no. I didn't ask you anything.
16 All you need to say is "right," because that
17 was the question asked. We'll get out of
18 here faster, or you will, not us, if you
19 answer my questions, not ones I didn't ask.
20 Okay?

21 A. What's your question?

22 Q. Good. If you pay attention, we'll
23 go through it.

24 A. I've been paying attention very
25 carefully.

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2 Q. The question was --

3 A. And lots of questions are not
4 properly phrased, so I have to --

5 Q. I know I'm not up to your
6 standards, but I'll try. So here we go.

7 You didn't look to see, having
8 looked at the extract that you saw, there was
9 Teenage Vamps was not listed, having looked
10 at Exhibit 6, you saw that money was paid to
11 Extreme on Teenage Vamps, you didn't look at
12 the BMI statements to see were the
13 Marderosians paid on Teenage Vamps; is that
14 right?

15 MR. MARDEROSIAN: Meaning did he do
16 a comparison to see if the performance
17 royalties supposedly reported by Extreme
18 matched the performance royalties of
19 Aron and Robert's BMI statements for the
20 exploitation of Teenage Vamps? Is that
21 the question?

22 MR. ZAKARIN: Read back my
23 question, not Mr. Marderosian's speech.

24 MR. MARDEROSIAN: No. Mine is the
25 more accurate question.

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2 MR. ZAKARIN: Well, you can ask
3 your questions. This is my turn to ask
4 mine.

5 (Record read.)

6 Q. Simple question.

7 MR. MARDEROSIAN: Mr. Zakarin, can
8 you identify the amount of money you're
9 talking about that the Marderosians were
10 paid for Teenage Vamps?

11 Q. You can answer my question.

12 A. I was focused on what was not being
13 paid on, not what was. If I had to look and
14 compare on everything that they were paid on,
15 I'd never get the thing done.

16 Q. So you don't know one way or the
17 other whether they were paid on Teenage Vamps
18 by BMI; is that right?

19 A. I have no recollection in my mind
20 about that.

21 Q. And you have no idea, then, whether
22 they were underpaid, overpaid, or paid on a
23 comparable basis to what was received by
24 Extreme; is that correct?

25 A. Not on Teen -- not on --

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2 Q. Teenage Vamps.

3 A. Not on Teenage Vamps, but on
4 Mulholland Drive --

5 Q. That's the only question. Did I
6 ask you about Mulholland Drive?

7 A. I saw 60 pages of Mulholland Drive
8 promotional announcements that Bayham was
9 paid on, and they were not paid. And when I
10 see 60 pages where Bayham is paid and are
11 clearly identified and associated with the
12 plaintiffs and not in the BMI statements, the
13 only thing I can imagine is that there are
14 other composers who were paid on those works.
15 That's what I was focused on. Teenage Vamps
16 was just a matter of the fact that you
17 provided a report that didn't include it.

18 Q. Is it possible you have a limited
19 imagination?

20 A. I think that's an insulting
21 question.

22 Q. I'll withdraw the question. You
23 just said the only thing that you can imagine
24 is that there was some, you know, some change
25 in the data or it was misdirected; is that

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2 right?

3 A. It's a figure of speech. I said
4 earlier --

5 Q. Oh. It's a figure of speech when
6 you say it's the only thing you can imagine.
7 Let me just try it. Other --

8 MR. MARDEROSIAN: You're getting
9 argumentative, Don. Argumentative.

10 Q. Are there other possibilities that
11 you could imagine, Mr. Kohn?

12 MR. MARDEROSIAN: He's not going to
13 speculate. He's not going to speculate.

14 MR. ZAKARIN: That's all he's done
15 today.

16 MR. MARDEROSIAN: Incorrect.
17 That's an argumentative and insulting
18 statement. And I object to that.

19 MR. ZAKARIN: It's an accurate
20 statement.

21 A. I would like to see, given what --

22 MR. MARDEROSIAN: It's based on the
23 evidence that you've produced in the
24 case.

25 MR. ZAKARIN: I understand. I've

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questions.

MR. MARDEROSIAN: Thank you, Don.

Are we done?

MR. HWANG: Close it out.

MR. MARDEROSIAN: Same stipulation
as we reached with the other experts
where I get the original, notify you of
any changes. We good with that?

MR. ZAKARIN: Yes.

(Time noted: 11:00 a.m.)

ROBERT H. KOHN

Subscribed and sworn to before me
this ____ day of _____, 2018.

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C E R T I F I C A T E

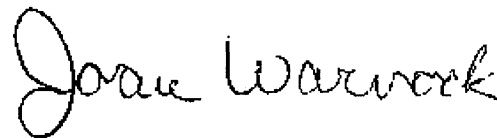
STATE OF NEW YORK)
: ss.
COUNTY OF WESTCHESTER)

I, JOAN WARNOCK, a Notary Public
within and for the State of New York, do
hereby certify:

That ROBERT H. KOHN, the witness
whose deposition is hereinbefore set
forth, was duly sworn by me and that
such deposition is a true record of the
testimony given by the witness.

I further certify that I am not
related to any of the parties to this
action by blood or marriage, and that I
am in no way interested in the outcome
of this matter.

IN WITNESS WHEREOF, I have hereunto
set my hand this 8th day of November,
2018.



JOAN WARNOCK